82-1126

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. MARGIOTTA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS
Counsel of Record
IRVING YOUNGER
ROBERT L. WEINBERG
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the federal mail fraud conviction of Petitioner, a political party leader, on the theory that:

a. the federal mail fraud statute, 18 U.S.C. § 1341, applies to alleged schemes to deprive the general electorate of its "intangible right" to the fiduciary services of private citizens who are active in the political process;

b. the federal mail fraud statute imposes on politically active individuals a *federal* fiduciary duty to render "honest and loyal service" to the general electorate;

c. Petitioner's political activity, including his position as a political party leader and involvement in political patronage, constituted a sufficient basis to render him a quasi-governmental fiduciary and to require him to make public disclosure of all "material information," including any "bias" or "conflict of interest" relating to his political activities;

d. the imposition of a new fiduciary duty on political activists did not violate Petitioner's right to free expression and association under the First Amendment and his right to fair notice and warning under the Fifth Amendment.

2. Whether the Court of Appeals erred in affirming Petitioner's conviction of Hobbs Act extortion, 18 U.S.C. § 1951, on the theory that:

a. although he was not a public official, Petitioner could nevertheless commit extortion "under color of official right" because he possessed political influence over public officials;

b. the evidence was sufficient to support Petitioner's extortion conviction, despite the absence of any extortionate conduct by a public official or fearful state of mind by the purported victim.

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Petitioner Joseph M. Margiotta prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The Court of Appeals, by divided vote, affirmed Petitioner's conviction of one count of mail fraud in violation of 18 U.S.C. § 1341. It also affirmed Petitioner's conviction of five counts of Hobbs Act extortion in violation of 18 U.S.C. § 1951. The Court of Appeals' opinion, with Judge Winter's dissent, is reported at 688 F.2d 108 and is set forth in the Appendix at 1a. Over the dissent of four judges, the Court of Appeals denied without opinion the Petition for Rehearing and Suggestion For Rehearing

En Banc (Pratt, J., not participating). The dissenting opinion of Judges Oakes, Meskill, Newman and Winter is set forth in the Appendix at 72a.

This case was previously the subject of two interlocutory appeals. The Court of Appeals' opinions issued in relation thereto are reported at 646 F.2d 729 (1981) and 662 F.2d 131 (1981).

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1982. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on November 5, 1982. This petition is filed within sixty days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The federal mail fraud statute, 18 U.S.C. § 1341, is set forth in the Appendix at 74a; the Hobbs Act, 18 U.S.C. § 1951, is set forth in the Appendix at 75a; and the statutory provision on Principals, 18 U.S.C. § 2(b), is set forth in the Appendix at 77a.

STATEMENT

A. Introduction.

This case involves the most unprecedented and dangerous extension of the federal mail fraud statute and the Hobbs Act that has ever been judicially permitted. Over Judge Winter's dissent, a divided panel of the U.S. Court of Appeals for the Second Circuit (Kaufman, J.) holds that under the mail fraud statute a private individual, if he is politically active or influential, can acquire a *federal fiduciary duty* of "honest and loyal" service to the general citizenry. Furthermore, the Court of Appeals holds that if a private individual breaches this imputed federal duty, as by failing to make a public disclosure

of a "bias" or "conflict of interest" when engaging in political activity, he commits a criminal fraud in violation of the statute.

Applying this novel "intangible rights" theory, the Court of Appeals affirms the conviction of Petitioner Joseph M. Margiotta, a political party leader. It holds that Petitioner breached this newly articulated federal fiduciary duty through his failure, in making a political patronage recommendation to local government officials, to disclose that his advice was biased by an alleged "bribe agreement" involving the sharing of insurance commissions with political party members.

As Judge Winter notes in his dissent, the Court of Appeals gives the mail fraud statute "a more sweeping interpretation than any court which has addressed the statute to date." (A. 62a).[1] It "expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." (A. 60a). If the statute may be stretched to reach political party leaders like Petitioner, "there is no end to the common political practices which may now be swept within the ambit of mail fraud." (A. 63a). The panel majority "not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists." (A. 71a). This "limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution." (A. 69a).

Until the decision below, no court had held that the mail fraud statute embraces a theory of "political crime" by "political activists." (A. 71a). Yet in this criminal

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[1] References herein to "A." are to the Appendix to the Petition; references to "C.A." are to the Appendix filed in the Court of Appeals; references to "R." are to the Record on Appeal in the Court of Appeals; and references to "Tr." are to the transcript of the second trial.

case, with no basis in prior law, the Court of Appeals devises a novel "intangible rights" theory applicable to political activists and then retroactively finds that Petitioner's conduct violates the judicially enlarged statute. This decision not only pushes the statute beyond all reason, but poses a direct threat to the First Amendment rights of all participants in the political process and offends basic guarantees of fair notice and warning under the Fifth Amendment. It also constitutes an unwarranted intrusion upon the sovereign right of state and local governments to define their own political systems.

Earlier this Term the Court granted certiorari to decide the question whether the anti-fraud provisions of the federal securities law can be construed to impose fiduciary duties on securities analysts. *Dirks* v. *Securities and Exchange Commission*, 681 F.2d 824 (D.C. Cir. 1982), *cert. granted*, No. 82-276 (November 15, 1982). While it poses similar questions in a different setting, the present case is of considerably greater importance, since it involves *criminal* penalties in an area of constitutionally protected conduct and applies to all participants in the political process. The broad and perilous sweep of the decision below demands that certiorari likewise be granted.

The Court of Appeals' holding that Petitioner committed Hobbs Act extortion "under color of official right" is also unprecedented. Official extortion can be committed only by a public official, which Petitioner is not. And since Petitioner did not cause any public official to commit "official" extortion, the "adopted capacity" doctrine of 18 U.S.C. § 2(b) is inapplicable. In effect, the Court of Appeals upholds Petitioner's conviction on the theory that his political influence requires that he be deemed a public official for purposes of Hobbs Act extortion. This novel and extreme holding distorts the elements of "official" extortion and draws legitimate political activity within the statute. Moreover, the erroneous indictment and jury

instructions under the mail fraud charge, which led to the receipt of otherwise inadmissible evidence regarding the Petitioner's involvement in partisan politics, unfairly prejudiced the jury's consideration of the Hobbs Act charges and require reversal of the conviction of those counts as well.

B. Statement of Essential Facts.

Petitioner Joseph M. Margiotta is the Chairman of the Republican Party of both the Town of Hempstead and Nassau County. Upon assuming those positions in 1968 and 1969, respectively, Petitioner became involved in an ongoing political patronage practice based on the sharing of insurance commissions on municipal properties. This patronage practice had openly existed throughout New York State for more than fifty years and had been followed by Democrats and Republicans alike. (Tr. 1305-06, 1440, 1724-30, 3168-76). Typically, a county or town government would designate a "broker of record" to place insurance on its properties. The broker, invariably chosen on the basis of political affiliation, was not a public employee but simply an ordinary insurance agent who represented the municipality along with other private clients. The broker's compensation was in the form of commissions which he received on the basis of the premiums paid by the municipalities. Under this patronage practice the broker would distribute a portion of these commissions to other politically selected brokers who usually performed no services.

After becoming Republican Chairman for the Town of Hempstead in 1968, Petitioner was informed that Mortimer Weis, the insurance broker then designated by the Town, was retiring from the business because of his age. For many years Weis had been sharing his commissions with designees of the Republican Party. (C.A. 893-99). At the request of Richard B. Williams ("Williams, Sr."), who was a long-time political colleague and personal friend, Petitioner recommended that Williams'

firm, Richard B. Williams & Son, Inc. (the "Williams Agency"), be chosen to succeed Weis. (C.A. 891-907). In January 1969, based on the support of Ralph Caso, a Republican who was the Town's Presiding Supervisor, the Williams Agency was designated as the Town's broker. In 1971 Caso, then County Executive, similarly designated the Williams Agency as broker for the County. Until 1978, when the practice was discontinued at Petitioner's request, the Williams Agency distributed a substantial portion of its commissions on Town and County insurance to non-working brokers selected by Petitioner and other Republican Party leaders.

During the more than fifty years that the insurance system operated, neither the New York State Insurance Department or any other State authority ever cited or disciplined anyone for engaging in this patronage practice. Until 1978, no New York law prohibited the sharing of municipal commissions among non-working brokers. Until mid-1975, the New York State administration operated its own—and substantially larger—insurance patronage system, annually dispensing commissions of almost $600,000 on State insurance to politically selected brokers who performed no services. (Tr. 1154, 1168). Existing authority confirmed the legality of the practice, and an informal opinion in 1943 by the General Counsel of the State Insurance Department had concluded that an agent placing municipal insurance could lawfully be required to share his commissions with non-working brokers who performed no services. This remained the Department's position until 1978 when Governor Carey promulgated a new State regulation requiring the performance of services by recipient brokers. (C.A. 559-64, 575-76).[2]

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[2] Petitioner discontinued the insurance patronage practice among brokers in the County and Town when this State regulation was proposed, and it had thus been ended long before the commencement of the grand jury investigation in this case. The Williams firm thereafter retained all its commissions. (C.A. 899-900).

Moreover, during 1978 hearings by a state commission on the insurance patronage system, Petitioner was personally assured by present and former Insurance Superintendents that the patronage practice in the County and Town was lawful under Insurance Department opinions. (C.A. 897-98).

Despite this background, in 1980 Petitioner was indicted on one count of mail fraud and five counts of Hobbs Act extortion. Although the patronage practice had existed since 1925 and involved thousands of persons in varying ways, no one else was indicted. Count One of the Indictment charged Petitioner with violating the mail fraud statute by devising a scheme to deprive the citizens of the State of New York, Nassau County, and the Town of Hempstead of their alleged right to his "honest and faithful participation . . . in [their] governmental affairs." (C.A. 17). The crux of the charge was that Petitioner had a "secret understanding" with the Williams Agency under which he would use his political influence to have the Williams Agency designated as broker, and in return the Agency would allegedly "kickback" 50 percent of its commissions to Republican Party members selected by Petitioner. The government contended that Petitioner's political influence imposed on him a fiduciary duty to be "honest and faithful" to the general citizenry and that he breached that duty, and thus violated the mail fraud statute, by not disclosing to County and Town officials that his political backing of the Williams Agency was tainted by a "conflict of interest" due to his alleged agreement to receive a "bribe."

The Hobbs Act counts were based on separate instances of commission sharing by the Williams Agency. The Indictment charged that each instance constituted Hobbs Act extortion "under color of official right" because the Williams Agency's payments were induced by (i) its "reasonable belief" that the Town Supervisor and County Executive would appoint or dismiss as broker any person

whom Petitioner told them to appoint or dismiss, and (ii) its "reasonable belief" that it would not be continued as broker if it did not make the payments. (C.A. 25). Alternatively, the Indictment charged that the commission sharing was induced by Petitioner's wrongful use of fear.

C. Trial Court Proceedings.

There were two trials, the first resulting in a mistrial when the jury was unable to reach a verdict after eight days of deliberation.[8] In the second trial the jury returned a guilty verdict on all counts. The trial court sentenced Petitioner to concurrent two-year terms of imprisonment on each count.

Although the mail fraud charge was based on an alleged fiduciary breach, the trial court did not find that Petitioner had any fiduciary duty under New York law or had violated any state law. Moreover, although the government attempted to show that Petitioner's political party role gave him substantial political influence, the trial court found that Petitioner did not have *de facto* control over any governmental entity. Following the first trial, the trial court stated that "[t]he only participation concerning which there was evidence at trial was that defendant was consulted about and recommended the appointment of officials and employees to various positions in local government." (C.A. 89-90). Despite the traditional nature of Petitioner's political activity, the trial court nevertheless proceeded to adopt a theory under which the jury could find that Margiotta was a fiduciary if he "participate[d] in Governmental affairs." The trial court instructed the jury that, if Margiotta had undertaken to "participate . . . in Governmental affairs honestly and faithfully," he would have committed fraud if he made recommendations or gave advice "while conceal-

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[8] The jury's vote was reported as having been 8-4 or 9-3 in favor of acquittal. (Tr. 470, R. 86, 87, 94).

ing . . . the fact that he ha[d] . . . agreed to receive a bribe to influence him in the performance of his governmental functions." (C.A. 120-21).

The government's theory under the Hobbs Act was that Petitioner was a *de facto* public official and personally committed extortion "under color of official right." The trial court rejected this theory but instead instructed that Petitioner could be found guilty as a principal pursuant to 18 U.S.C. § 2(b)[4] if he caused public officials "to contribute in a substantial way to inducing the Williams Agency to pay out the monies referred to in Counts Two through Six." (C.A. 143). The trial court also instructed the jury on extortion by wrongful use of fear.

D. The Court of Appeals' Decision

The Court of Appeals' opinion recognizes that "this [is a] case of first impression" and concedes that it presents a "novel application of the mail fraud statute on an 'intangible rights' theory to a non-office holder such as Margiotta." (A. 20a). It also acknowledges that the "fiduciary duty associated with the public's intangible right to an individual's honest and faithful participation in governmental affairs has been accepted *only where the defendant is a public official.*" (A. 22a) (emphasis added). Consequently, "the instant case raises the novel issue whether an individual who occupies no official public office but nonetheless participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible rights that may lay the basis for a mail fraud prosecution." (A. 23a).

The Court of Appeals answers that question affirmatively. Postulating a federal common law of fiduciary

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[4] Section 2(b) provides:

"Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

duty, the Court approves the trial court's jury instructions, which it finds were based on "(1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a *de facto* control test under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary." (A. 24a). The Court of Appeals also holds that this duty arises under the mail fraud statute itself and that no fiduciary duty under state law need be shown. (A. 28a-29a). Recognizing an "intangible right to 'good government,'" the Court of Appeals further states that no undertaking of impartiality by Petitioner was required as a predicate for this duty and that as a federal fiduciary Petitioner "owed at least a duty to disclose material information or give notice of his conflict of interest to those in government who relied upon him." (A. 21a, 34a, 37a).

In upholding Petitioner's conviction for Hobbs Act extortion "under color of official right," the Court of Appeals stated that it sufficed if Petitioner caused the Town and County to designate and retain the Williams Agency as broker and that the Williams Agency made the challenged payments to retain its position. It stated that Petitioner, although not a public official, could be liable under 18 U.S.C. § 2(b) for causing public officials unknowingly to use their power of office in such a manner as would induce the payments.

Judge Winter dissented from the affirmance of the mail fraud conviction. He stated that the panel "majority's use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." (A. 60a). By a vote of six to four, the Court denied rehearing *en banc* (Pratt, J., not participating).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Issues of Great Importance to the Political Process and the Right of Private Citizens to Engage In Political Activity.

This case presents major questions concerning the right of private citizens, including political party leaders, to engage in political activity without fear of criminal prosecution. Under the guise of construing the federal mail fraud statute, the Court of Appeals creates a new federal criminal law requiring politically active persons to act as "disinterested fiduciaries" for the whole electorate. The defendant is not required to have intended any monetary or tangible loss, to have held any fiduciary status under state law, or to have violated any state or local law. Instead, based solely on a defendant's political activity, juries are allowed to find federal fiduciary duties, and attendant obligations to disclose, where none had previously been recognized. As Judge Winter notes, "Reduced to essentials, the majority holds that a mail fraud conviction will be upheld when a politically active person is found by a jury to have assumed a duty to disclose material facts to the general citizenry and deliberately failed to do so." (A. 60a). Under this regime, a politically active person will now apparently be required to be "impartial" when engaging in political speech or lobbying government, since he may otherwise unknowingly violate his new federal fiduciary duty of "honest and loyal" service to the general citizenry. (A. 37a).

Because this new criminal rule is not limited to any specific kind of political activity, Judge Winter's dissent is correct in concluding that there is "no end to the common political practices which may now be swept within the ambit of mail fraud." (A. 63a). Every political leader, candidate, lobbyist, and interest group—even an influential religious leader or newspaper editor—may be exposed to criminal sanction based on involvement in "governmental affairs." The "fraudulent act" need consist of nothing more than a failure to disclose a "bias," or

"conflict of interest," or other "material fact" in "campaign literature," "public speeches," or other form of political expression. (A. 63a, 64a). The Court of Appeals' decision plainly strikes at the core of our system of self-government, which is dependent upon the right of all individuals to free expression and association. The decision below impermissibly "subjects politically active persons to criminal sanctions based on what they say or do not say in their discussions of public affairs." (64a). It seeks to impose on all political advocates, including party leaders like Petitioner, an orthodoxy that is antithetical to the First Amendment.

Judge Winter accurately states that the Court of Appeals creates "a catch-all political crime which has no use but misuse" and "vests federal prosecutions with largely unchecked power to harass political opponents." (A. 69a n.5). Despite the obvious inhibition to the exercise of free expression and association, the Court of Appeals' decision contains not "even the vaguest contours of the legal obligations created," but relies solely on mere rhetoric about "the obligation to conduct governmental affairs 'honestly' or 'impartially,' to ensure one's 'honest and faithful participation' in government and to obey 'accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.'" (A. 68a). It thus forces all persons to act at their peril when engaging in political activity.

In recognition of this very threat, the four judges who dissented from the denial of *en banc* review concluded that "the extension of the mail fraud statute, . . . reflected in the panel decision, warrants *en banc* consideration of the fundamental and recurring issue of whether the statute applies to schemes to defraud members of the public of intangible rights, such as a right to the faithful performance of duty by a public official or a political leader exercising equivalent authority." (A. 73a). For the same reason this Court should review the decision below.

II. The Decision Below Is Inconsistent With This Court's Prior Decisions and Creates a Conflict in the Circuits.

A. *The Decision Below that the Mail Fraud Statute Punishes Political Activity By Private Citizens Is Unprecedented and Unsupported.*

As the Court of Appeals conceded (A. 22a), the specific fiduciary obligation alleged here—a duty to the general citizenry requiring "honest and faithful" participation in governmental affairs—had previously been recognized as a proper basis for a federal mail fraud violation only where the defendant was a *public official. E.g., United States* v. *Mandel*, 591 F.2d 1347, 1358 (4th Cir.), *aff'd per curiam in relevant part*, 602 F.2d 653 (1979) (*en banc*), *cert. denied*, 445 U.S. 961 (1980). Nevertheless, the Court of Appeals expanded this controversial "intangible rights" theory to mean that a *private citizen* who engages in political activity is subject to the same fiduciary duty that a government official owes to the public and may be criminally prosecuted for a violation of that asserted duty.

This monumental extension of § 1341 creates an entirely new class of mail fraud "crimes" never before recognized in the law and allows a federal prosecutor to police the political activity of all citizens according to his own notions of "sound morals" and "good government." (A. 21a). As Judge Winter's dissent correctly states, the panel's holding "finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation." (A. 66a). As shown by a recent analysis of the entire legislative history, which the four dissenting judges cited below, the mail fraud statute was directed at lottery swindles and other discrete economic abuses. Its extension to cover fiduciary breaches of any sort, and particularly by public officials under a political "intangible rights" theory, lacks founda-

tion in Congressional intent. Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under The Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 566-69 (1980). To the contrary, the legislative history "indicate[s] that the statute only reaches schemes that have as their goal the transfer of something of economic value to the defendant." *Id.* at 566.

But whatever the propriety of the statute's application to fiduciary breaches by public officials, its extension to regulate political participation by private persons in "Governmental affairs" is beyond the pale. There is not a scintilla of evidence that the far-fetched "fraud" theory invoked against Petitioner was even recognized, much less adopted by Congress, when this statute was enacted in 1872, or in any of the subsequent amendments. As shown in Judge Winter's dissent,

> "The legislative history of the mail fraud statute gives no indication that the statute was ever intended by Congress as an all-purpose weapon against political corruption . . . . None of these [subsequent amendatory] changes indicates that the Congress considered mail fraud to be an appropriate statute for prosecuting political corruption and deception. Even if there were not a canon of construction calling upon us to avoid broad construction of criminal statutes, the recent extension of mail fraud by judicial fiat would be unwarranted." (A. 64a-65a n.4).

The decision below flies in the face of this Court's directives that the mail fraud statute cannot be extended to conduct that is not "in the nature of deceit or fraud as known to the law or generally understood," *Fasulo* v. *United States*, 272 U.S. 620, 629 (1926), and that any further expansion of the statute "must . . . [be] at the initiative of Congress and not of this Court." *United States* v. *Maze*, 414 U.S. 395, 405 n.10 (1974).

B. *The Decision Below That the Mail Fraud Statute Imposes Federal Fiduciary Duties on Politically Active Citizens Is Unprecedented and Conflicts With Decisions of this Court.*

The Court of Appeals' decision is additionally predicated on the erroneous notion that the federal mail fraud statute creates *federal* fiduciary duties. In holding that Petitioner need not have owed any fiduciary duty under state law, the Court of Appeals declared that the jury was entitled to find a fiduciary duty under federal common law. The Court held in effect that the mail fraud statute not only proscribes fraudulent deprivation of "intangible rights" possessed by the body politic, *but that it actually creates such rights.* Under the Court's approach, federal juries are granted authority to fashion new political rights and disclosure duties under the rubric of "fiduciary duty"—an open invitation for jurors to impose their own unwritten "ethical code" and notions of "good government." These federal fiduciary duties can be imposed by federal juries even where the state has chosen *not* to require politically active citizens to serve as quasi-governmental fiduciaries, but has instead guaranteed the full measure of free speech and association. Quite plainly, this novel use of the mail fraud statute constitutes an intrusion upon the sovereign right of the states and their constituent local governments to define their own political systems.[5]

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[5] As Judge Winter observed, "no violation of state or local law is necessary to support the federal mail fraud conviction [under the panel majority's view] since a jury is free to find a federal duty to disclose material facts." (A. 61a).

In *dicta*, however, Judge Kaufman's opinion additionally postulates that Petitioner had a fiduciary duty under New York law as well—a totally groundless assertion. The trial court found no state-law duty and, as Judge Winter notes, "the majority cites no New York authority establishing the duties they impose on political activists or public officials." Moreover, "there is nothing to indicate that [political party] officers have legal obligations under state law such as those imposed on Margiotta by the majority," and "[t]he

The Court of Appeals decision is directly contrary to the principle that "[t]here is no federal general common law," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), and no "federal common law of crimes" to be developed by federal courts. *Parratt* v. *Taylor*, 451 U.S. 527, 531 (1981). As the Court of Appeals itself expressly acknowledges (A. 29a), its decision is directly contrary to this Court's refusal to create federal fiduciary standards for the anti-fraud provisions of Rule 10b-5 of the federal securities act. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977). As the Court stated in *Santa Fe*, "there may well be a need for uniform federal fiduciary standards . . . [b]ut those standards should not be supplied by judicial extension of 10b and Rule 10b-5 . . . ." *Id.*, at 479-80. Ironically, while the Supreme Court has held that there are no federal fiduciary duties even under *civil* anti-fraud provisions, the Court of Appeals holds that there are federal fiduciary duties under *criminal* anti-fraud provisions.

III. The Decision Below Is In Conflict With the First Amendment Rights of Free Speech and Association and Prior Decisions of this Court.

The Court of Appeals' decision directly impinges upon the First Amendment. To require a political party or its chairman to act as a "disinterested" fiduciary for the whole electorate, including political opponents, abridges the right of political association. Judge Winter points out that "the majority is quite simply wrong in brushing aside the First Amendment issues [since] . . . the theory they adopt subjects politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs." (A. 64a).

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majority's assertions to the contrary are thus sheer *ipse dixit*." (A. 61a n.2). Finally, since Judge Kaufman's opinion holds that New York law is irrelevant to a federal mail fraud violation, the existence *vel non* of a state-law fiduciary duty is of no significance under the decision below.

This kind of restriction on the content of political speech violates the fundamental principle that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972).

The Court's decision is not only wrong but dangerous. In Judge Winter's words, "Quite frankly, I shudder at the prospect of partisan political activists being indicted for failing to act 'impartially' in influencing governmental acts . . . . In a pluralistic system organized on partisan lines, it is dangerous to require persons exercising political influence to make the kind of disclosure required in public offerings by the securities laws." (A. 68a-69a). In fact, the Court's decision imposes disclosure obligations *greater* than those under the federal securities laws, since it takes the additional step of allowing juries to impose federal fiduciary duties.

The panel opinion asserts that the trial court's instructions somehow provide a "safe harbor" for party leaders who simply stick to "party business" and avoid "governmental affairs" (A. 25a)—a cryptic and, in practical terms, non-existent distinction that is obnoxious to the concept of democratic self-government and to the rights of free speech and political association. Instructions based on a nebulous, ad-hoc slogans like "participation in Governmental affairs" are plainly inadequate as a standard for criminal liability and give the juries *carte blanche* to invent crimes. The panel opinion finds solace in the notion that the jury instructions contain a "reliance test" and a "*de facto* control test."[6] But it cites no case under New York law, or the law of any jurisdiction, holding that a private person becomes a fiduciary for the general public under such a standard. These so-

[6] The panel opinion does not identify where the "*de facto* control" test was supposedly contained in the jury instructions (C.A. 116-17), which were in fact based exclusively on a vaguely formulated "reliance" standard.

called "tests," which amount to nothing more than a transparent contrivance to fit this case, totally obliterate the necessary distinction between public officials and private individuals and put everyone at peril when engaging in political activity. They contain no discernible standard for determining the existence of the asserted fiduciary duty, or the contours of the legal obligations allegedly imposed. As Judge Winter states, "Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." (A. 68a).

IV. The Decision Below Is In Conflict With the Fifth Amendment Right to Fair Notice and Warning and Prior Decisions of this Court.

The Court of Appeals' decision makes a mockery of the Constitutional right to fair notice and warning. Prior to the present Indictment, there was no theory that a fiduciary duty—under federal or state law—could arise based on "participation in Governmental affairs." The Court gives no clue as to how anyone, much less Petitioner, was supposed to perceive that he had a fiduciary obligation which was acquired invisibly, unknowingly, and unwillingly. Its holding is in direct conflict with this Court's decision that due process forbids a conviction based on an affirmative legal duty of which the defendant had no knowledge or probability of knowledge. *Lambert* v. *California*, 355 U.S. 255 (1957).

The Court of Appeals' decision opens the door to arbitrary, capricious and discriminatory use of the federal mail fraud statute. That misuse is illustrated dramatically in the present case where only Petitioner was prosecuted for a patronage practice that had existed for more than fifty years and involved thousands of persons. The Court of Appeals itself acknowledges that "the distribution of insurance commissions on municipal properties to non-working brokers was a patronage system practiced by both Democrats and Republicans in the

County for decades." (A. 19a). As Judge Winter likewise notes, "[E]ven as to the partisan distribution of insurance commissions, the government concedes that Margiotta's conduct, so far as relevant to mail fraud, was hardly unique; in fact, it was a state-wide practice." (A. 70a).

Judge Winter's dissent points out that Petitioner's Democratic counterpart had previously followed this patronage practice and that New York State openly operated its own—and much larger—insurance patronage system.[7] Commission sharing with non-working brokers was shown to be so widespread that in his closing argument the prosecutor was finally forced to admit to the jury that it was a "well-known practice" and that there was "[a]bsolutely nothing wrong" with it. (Tr. 3350, 3544).

In short, Petitioner was indicted, tried, and convicted on a fiduciary rule that was literally unprecedented and that has been applied to no one else. As Judge Winter states, "Notwithstanding the statewide existence of what in the majority's view was mail fraud, only Margiotta was indicted." (A. 71a). The panel majority thus "not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists." (A. 71a). "[T]he potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors" as a result of the Court of Appeals' opinion are "profoundly troubl[ing]"

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[7] By 1974, the New York State Office of General Services ("OGS"), which through its Bureau of Insurance purchases insurance for State agencies, annually dispensed commissions amounting to almost $600,000 on State insurance to about 250 politically-selected brokers who did no work. (Tr. 1154-58; 1168). On becoming the head of OGS in 1971 and inquiring about the propriety of this patronage system, Commissioner O'Hara was informed by the OGS staff that "the splitting of commissions was a perfectly legal procedure" under New York law and should be continued. (C.A. 1235).

concerns. (A. 70a). A decision of this nature cannot be allowed to stand.

V. The Decision Below That Petitioner Committed Hobbs Act Extortion "Under Color of Official Right" Conflicts With the Plain Meaning of the Statute.

Extortion "under color of official right" can be committed only by a public official. *United States* v. *Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Because he was not a public official, Petitioner lacked the requisite statutory capacity and could not as a principal have committed "official" extortion. The Court of Appeals held, however, that Petitioner could nevertheless commit "official" extortion if he caused Town and County officials "to contribute in a substantial way to inducing the Williams Agency" to make the challenged payments. (A. 46a). The Court stated that if Petitioner caused any public official to perform any official acts, then under 18 U.S.C. § 2(b) Petitioner would have adopted both the acts and the capacity of the public official. The Court thus concluded that if Petitioner caused public officials to appoint and retain the Williams Agency as broker, he would have committed "official" extortion.

As with the mail fraud count, this holding was unprecedented. A person lacking the requisite capacity to commit a specific offense is liable under the "adopted capacity" doctrine of 18 U.S.C. § 2(b) only where the intermediary was actually caused to commit the criminal act. *See, e.g., United States* v. *Ruffin*, 613 F.2d 408 (2d Cir. 1979). The intermediary need not have had a criminal intent. *United States* v. *Ordner*, 554 F.2d 24 (2d Cir.), *cert. denied*, 434 U.S. 824 (1977). But to establish that a "capacity" offense was indeed committed, it is necessary that the person possessing the requisite capacity, *i.e.*, the public official, have in fact performed the specific acts constituting the underlying substantive offense. Section 2(b) thus states that a person is responsible as a

principal if he "willfully causes *an act* to be done *which* if directly performed by him or another *would be an offense against the United States*. . . ." Until the decision below, therefore, courts have agreed that where the criminal statute requires a particular capacity, the person "meeting the capacity requirements . . . [must] engage in the proscribed conduct," since otherwise the underlying offense would not have been committed. *United States* v. *Ruffin*, 613 F.2d at 409. *Accord*, *United States* v. *Wiseman*, 445 F.2d 792 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States* v. *Lester*, 363 F.2d 68.

In the present case, the Indictment did not charge, the instructions did not require the jury to find, and the proof at trial did not show that Petitioner caused a public official to commit "an act . . . which . . . would be an offense against the United States," that is, extortion "under color of official right" in violation of the Hobbs Act.

Consideration of each of the elements of the offense demonstrates the absence of the requisite causation.

First, "official" extortion consists of a public official's wrongful use of his office to obtain money not due him or his office. *United States* v. *Nardello*, 393 U.S. 286, 289 (1959). Unlike extortion by means of fear, extortion "under color of official right" does not require any proof of actual or threatened force, violence, or fear. Rather, the " 'fear' element on the part of the 'victim' [is] implied from the public official's position of authority over the victim." *United States* v. *Butler*, 618 F.2d 411, 418-19 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980).

Here, the Indictment did not charge, and the jury was not required to find, that any public official personally received, or transferred to third parties, any payment not due him or his office. In fact, the public official involved, Town Supervisor and County Executive Caso, was not the recipient, directly or indirectly, of any payments by the Williams Agency, nor did he direct any payments to third parties.

Second, for official extortion there must be a "misuse of one's office to induce [the] payment. . . ." *United States* v. *Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). Here, the Indictment did not charge, and the jury was not required to find, that any public official misused his office to induce payments. Petitioner did not cause Caso to demand or induce any payments. In fact, it was undisputed that Caso was not a party to any arrangement with the Williams Agency concerning its commission sharing or payments, did not misuse his public office to induce payments of money, and did not engage in extortionate conduct violative of the Hobbs Act. Caso testified that he was unaware of the commission sharing, and the Court of Appeals acknowledged that there was no misuse of Caso's office. (A. 46a-47a).

Finally, for official extortion it must be shown that the victim's "motivation for the payment focuse[d] on the recipient's office." *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). The Indictment did not charge, and the jury was not required to find, that the Williams Agency's motivation focused on the "recipient's office." The Indictment charged instead that the Petitioner committed official extortion because the payments were induced by the Williams Agency's perception of his political influence, that is, "by the Williams Agency's reasonable belief that the Nassau County Executive and/or Presiding Supervisor of the Town of Hempstead, would appoint or dismiss, as Broker of Record . . . any person whom the defendant told him to appoint or dismiss in his capacities of Town . . . [and] County Republican Chairman." (C.A. 25). In fact, Williams, Jr. testified that he made the commission payments because of his understanding that his father had a verbal contract with Margiotta and that he was obligated under contract law to comply. (A. 451, 535-38).

No one, and especially not Williams Jr., suggested that the Williams Agency shared commissions or made payments because of Caso, the power of Caso's office, or any extortionate conduct by Caso.

In sum, Petitioner was not charged with having caused public official Caso to commit the *actus reus* of "official" extortion. All that was charged was that Petitioner influenced Caso to designate and retain the Williams agency as broker. But those actions by Caso did not constitute "official" extortion—Caso obtained no money not due him or his office (either personally or by transfer to third parties); Caso did not misuse his office to induce any payments; and the Williams Agency was not motivated by Caso as the recipient of the money.[8]

Petitioner was held to have committed extortion "under color of official right" simply because he possessed influence over public officials. Under this view, anyone who can influence government is subject to indictment for extortion "under color of official right." All that is required is that the governmental action or inaction have "contribute[d] in a substantial way" to inducing the "payment." (A. 46a). This doctrine totally distorts the elements of extortion "under color of official right." It is

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[8] The panel opinion argues that Caso's designation of the Williams Agency as broker was "official" extortion because, had he been aware that the Agency was making payments at Margiotta's direction, Caso could have been found guilty of extortion as a principal. (A. 44a-45a). The argument contains an obvious fallacy. If the Williams Agency's payments were induced by wrongful use of fear, then the fact of Caso's knowledge might indeed make him liable as a principal—but to extortion by fear, *not* "official" extortion. Under the panel opinion's hypothetical (as in this case), Caso would not have committed official extortion because he would not himself have demanded the payments, would not himself have received money or directed it to third parties, and would not himself have motivated the Williams Agency to make the payments.

indistinguishable from a general proscription against anyone influencing government in exchange for any valuable consideration and thus criminalizes a whole range of conduct that has traditionally been regarded as legitimate lobbying and political activity.

In response to the point that its new statutory reading draws "legitimate lobby and political activity" within the Hobbs Act, the Court of Appeals contends simply that these activities are sufficiently protected by the jury instruction requiring that Petitioner be found to have acted with "criminal intent." (A. 48a). In sum, the interpretation of the statute does not matter, since only those with "criminal intent" will be prosecuted or convicted. This argument hardly constitutes a justification for the overextension of a criminal statute. Nor is it likely that most party leaders, lobbyists or other political activists would regard a prosecutor's perception of their criminal intent *vel non* as providing much protection. Under this analysis, there would be no need for written criminal laws, since only those with "criminal intent" need fear conviction.

Finally, the conviction on the Hobbs Act counts must in any event be reversed because the inclusion of the improper mail fraud count allowed the prosecution to introduce otherwise irrelevant evidence concerning Petitioner's partisan patronage activities. This evidence was highly prejudicial on the Hobbs Act counts and strongly tended to bias the jury's consideration of them.[9]

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[9] The jury was instructed on both extortion by "fear" and extortion "under color of official right." Because the jury returned a general verdict, the conviction must be reversed if either ground is unsupported. *Yates* v. *United States*, 354 U.S. 298 (1957). Moreover, Petitioner challenges both grounds for conviction in this case.

CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
Counsel of Record
IRVING YOUNGER
ROBERT L. WEINBERG
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

January 1983

APPENDIX

APPENDIX A

United States Court of Appeals
Second Circuit

No. 1238, Docket 82-1025

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH M. MARGIOTTA,
Appellant.

Argued June 2, 1982

Decided July 27, 1982

Before KAUFMAN and WINTER, Circuit Judges, and WARD, District Judge.*

IRVING R. KAUFMAN, Circuit Judge:

The significant role played by political parties in municipal government has been an often noted characteristic of American urban life. Some critics, contributing to the prevailing mythology that machine politics have controlled the corridors of local government,[1] have highlighted the opportunities available to those who hold the strings of political power[2] for defrauding the citizenry and reaping personal gain through the sale of public office and other favors. Other commentators, however, have asserted that local party leaders have often served important functions of political representation and association. In cities fragmented into diverse social and economic groups, it has

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* Of the United States District Court for the Southern District of New York, sitting by designation.

[1] *See* J. Robertson, American Myth, American Reality 265-66 (1980).

[2] *See* J. Bryce, The American Commonwealth (2d ed. 1891).

been argued, party organizations have played a salutary role in organizing large numbers of people, and fulfilling their desires with patronage, jobs, services, community benefits, and opportunities for upward social mobility.[3] In sum, the line between legitimate political patronage and fraud on the public has been difficult to draw.

Today, not unmindful of these competing visions of political history, we must consider where such lines may be drawn in the context of a criminal prosecution for mail fraud[4] and extortion.[5] Specifically, we are asked to determine, *inter alia*, when, if ever, a political party leader who holds no official government office but who partici-

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[3] *See* J. Robertson, *supra* note 1, at 265. For an amusing description, and justification, of the operation of a political machine, see W. Riordon, Plunkitt of Tammany Hall (E. P. Dutton 1963).

[4] 18 U.S.C. § 1341 (1976) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing . . . or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[5] 18 U.S.C. § 1951 (1976) provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion or attempts or conspires so to do, commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

pates substantially in the governance of a municipality owes a fiduciary duty to the general citizenry, and what conduct violates such a fiduciary duty. The issues before us arise out of a criminal prosecution against Joseph M. Margiotta, long-time Chairman of the Republican Committees of both Nassau County and the Town of Hempstead, New York. The Government charges Margiotta with one count of maul fraud in violation of 18 U.S.C. § 1341 (1976) [6] and five counts of extortion in violation of 18 U.S.C. § 1951 (1976) [7] for activities in connection with the distribution of insurance commissions on municipal properties to Margiotta's political allies. The Government presented "evidence of a scheme of fraud spun into a web of political power" [8] at a trial before Judge Sifton, at which nearly seventy witnesses testified during a period of three weeks. After deliberating for eight days, the jury announced it was hopelessly deadlocked, and the trial judge declared a mistrial.

Upon a request by the Government, in anticipation of a retrial, Judge Sifton reconsidered a number of legal and evidentiary rulings made at the trial. The trial judge entered an order in which he stated that the challenged rulings would be followed at Margiotta's second trial. The Government then appealed to this Court for review of Judge Sifton's order prior to the retrial. We found those portions of Judge Sifton's order indicating the court would abide by certain jury instructions at retrial were not appealable pursuant to 18 U.S.C. § 3731 (1976) [9]

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[6] *See* note 4, *supra.*

[7] *See* note 5, *supra.*

[8] *United States v. Margiotta*, 662 F.2d 131, 135 (2d Cir. 1981).

[9] 18 U.S.C. § 3731 (1976) provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where

and, accordingly, dismissed the Government's appeal in that respect. While the portions of the order concerning the judge's evidentiary rulings were appealable, we concluded that the district court had acted well within its discretion, and affirmed the order on the evidentiary rulings.

Margiotta's retrial before Judge Sifton proved to be another closely fought contest. Following a trial lasting three weeks, the jury deliberated conscientiously for three days. It returned a verdict of guilty on all six counts, including the one count of mail fraud in violation of 18 U.S.C. § 1341 (1976) and the five counts of extortion in violation of 18 U.S.C. § 1951 (1976). Judge Sifton sentenced Margiotta to concurrent terms of imprisonment of two years on each count.

Margiotta appeals to this Court from the judgment of conviction entered by Judge Sifton. On appeal, he raises a number of claims, several of which involve novel issues. Margiotta argues that his conviction of mail fraud must be reversed and the indictment dismissed on the grounds that the federal mail fraud statute, 18 U.S.C. § 1341 (1976), does not embrace a theory of fiduciary fraud by individuals who participate in the political process but who do not occupy public office, and that Margiotta owed no fiduciary duty to the general citizenry of Nassau County and the Town of Hempstead under federal or state law. Moreover, he asserts that the evidence was in-

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the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information. . . .

The provisions of this section shall be liberally construed to effectuate its purposes.

sufficient to support a finding of fiduciary duty even if it were held that the trial court's instructions were not erroneous as a matter of law. In addition, Margiotta claims that the indictment and conviction violate his First Amendment rights of freedom of expression, association and petition, and that the mail fraud statute is impermissibly vague on its face and as applied to him on the facts of this case. Furthermore, he asserts that he did not fail to disclose material information in violation of the mail fraud statute. Margiotta also claims that his conviction of five counts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976), should be reversed and the indictment dismissed because he did not commit extortion "under color of official right" or through the wrongful use of "fear," and because the district court's allegedly improper instructions on the mail fraud count prejudiced the jury's consideration of the Hobbs Act charges. Finally, Margiotta argues that Judge Sifton erred by admitting Richard A. Williams's hearsay account of his father's alleged agreement with Margiotta. For the reasons stated below, we reject Margiotta's contentions, and affirm the judgment of conviction in all respects.

I. *Background*

Since the conduct at issue in this case involves an intricate scheme of fraud, we must set forth the facts in detail. As noted above, Joseph M. Margiotta, was at all relevant times the Chairman of the Republican Committee of both Nassau County and the Town of Hempstead, New York. Although he held no elective office, his positions as County and Town Republican Chairman, according to the Government, afforded him sufficient power and prestige to exert substantial control over public officials in Hempstead and Nassau County who had been elected to office as candidates of the Republican Party. This control, it was charged, enabled Margiotta to exercise influence over the appointees of these elected officials as well. The spread of

his political tentacles over the governments of Town and County allegedly offered Margiotta the opportunity to engage in a highly remunerative fraudulent design involving the distribution of insurance commissions on municipal properties to his political associates.

The responsibility of the Nassau County Executive and the Presiding Supervisor of the Town of Hempstead in maintaining the properties owned and operated by their respective jurisdictions was at the crux of this artifice. The holders of these public offices were responsible for obtaining insurance coverage for the properties owned by the Town and County. As a matter of practice, the authority for obtaining insurance on municipal properties was delegated to a Broker of Record designated by the entities and serving at their pleasure. The Broker of Record was the only individual who acted on behalf of these jurisdictions in placing insurance policies. The Broker received as compensation for his services commissions consisting of a portion of the monies paid by the municipalities for the insurance policies.[10]

According to the Government, this municipal insurance activity was transformed into a scheme to defraud the citizens of Hempstead and Nassau County in 1968. At that time, Margiotta allegedly contrived the appointment of Richard B. Williams & Sons, Inc., an insurance agency (hereinafter the "Williams Agency" or "Agency"), as Broker of Record for the Town of Hempstead. Richard B. Williams determined to have the Agency designated as Broker of Record for the Town, a position then held by one Mortimer Weis. Williams allegedly met with Margiotta and Weis to strike a secret "deal": The Williams Agency would be named Broker of Record for the Town of Hempstead, and Weis would become a $10,000 a year

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[10] Moreover, it appears that Nassau County also occasionally compensated the Broker of Record through personal services contracts not subject to competitive bidding.

consultant to the Town. In return for the appointment, the Williams Agency would set aside 50% of the insurance commissions and other compensation it received, to be distributed to licensed insurance brokers and others designated by Margiotta. Shortly thereafter, Ralph Caso, the Presiding Supervisor of Hempstead, appointed the Williams Agency as Hempstead's Broker of Record based on Margiotta's recommendation. In 1969, the Williams Agency began to write insurance for the Town of Hempstead, and commenced making "kickbacks" to brokers selected by political leaders of local election districts in the Town who were loyal to the appellant.

In 1970 Caso was elected County Executive of Nassau County. After his election, Richard B. Williams met with Margiotta to discuss the possibility of the Williams Agency acting as Broker of Record for Nassau County. On January 1, 1971, the day on which he took office, Ralph Caso designated the Williams Agency as Broker of Record for Nassau County based on Margiotta's recommendation. Soon thereafter, the Williams Agency commenced to distribute 50% of the commissions it earned on Nassau County properties to brokers and others politically allied with Margiotta. Between 1969 and 1978, according to the Government, the compensation paid the Broker of Record in connection with this arrangement totalled in excess of two million, two hundred thousand dollars. Among the recipients of more than five hundred thousand dollars in kickbacks were numerous insurance brokers who performed no legitimate work, lawyers and other friends of Margiotta who rendered no services in return for their compensation, and the appellant himself. The concealment of this fraudulent scheme, according to the Government, was fostered through the preparation of fictitious property inspection reports. As a result, it was made to appear that the recipients of the insurance commission kickbacks were legitimately earning their commissions. Moreover, the Government has charged the insurance activities were

disguised by Margiotta through false and misleading testimony during the course of an investigation by the New York State Investigation Commission.

In November, 1980, a federal grand jury indicted Margiotta on one count of mail fraud, in violation of 18 U.S.C. § 1341 (1976), and five counts of extortion, in violation of 18 U.S.C. § 1951 (1976). The mail fraud count (Count One) was based on a scheme to defraud the Town of Hempstead, Nassau County, New York State, and their citizens (1) of the right to have the affairs of the Town, County and State conducted honestly, free from corruption, fraud and dishonesty, and (2) of the right to Margiotta's honest and faithful participation in the governmental affairs of the Town, County and State. The factual predicate underlying Count One was the above-described insurance commission ruse in which, pursuant to a secret agreement, Margiotta arranged the appointment of the Williams Agency as Broker of Record for the Town and County in return for the Agency's payment of kickbacks to insurance brokers and others designated by Margiotta. Counts Two through Six charged Margiotta with violating the Hobbs Act by inducing the Williams Agency to make the payments of the insurance commissions under color of official right and by means of the wrongful use of fear. Count Two charged Margiotta with extortion in connection with the payments to the insurance brokers who were political allies. Count Three set forth a Hobbs Act violation based on Margiotta's actions in obtaining monthly payments in the amount of $2,000 from the Williams Agency to attorneys William Cahn and his son Neil Cahn between 1974 and 1975. Count Four was predicated on a $10,000 payment by the Williams Agency to one Robert Dowler, who allegedly entered into an agreement to pay one-half of the money to Margiotta. Count Five described a Hobbs Act offense arising from a series of payments totalling more than $60,000 to Joseph M. Reilly, a New York State Assemblyman, and Count Six charged Margi-

otta with extortion in connection with payments by the Williams Agency to Henry W. Dwyer, a New York State Assemblyman and consultant to the Nassau County Republican Committeee.

The first of the appeals spawned by this indictment arose from the pretrial maneuvering of the parties. On January 6, 1981, Margiotta filed a pretrial motion to dismiss Count One,[11] alleging, *inter alia*, that Count One failed to state an offense pursuant to 18 U.S.C. § 1341, that the Count was duplicitous, and that it was unconstitutionally vague. In response, the Government submitted an affidavit describing hundreds of items sent through the mails upon which a charge of fraudulent use of the mail could be based. Judge Sifton ruled that Count One stated an offence under § 1341, but ordered the Government to elect a single mailing to submit to the jury. The Government appealed Judge Sifton's order to this Court, which held that the order was appealable and that the Government was not required to elect among the numerous specified mailings. *United States v. Margiotta*, 646 F.2d 729 (2d Cir. 1981). Trial commenced on March 27, 1981. While the Government presented evidence to prove that Margiotta's involvement in the insurance activities was a scheme to defraud, Margiotta offered a defense of good faith. He attempted to prove that he had no secret agreement with the Williams Agency for the distribution of insurance commisisons as a *quid pro quo* for securing the appointment of the Agency as Broker of Record. Admiting that he recommended the Agency to be Broker of Record for both the Town and the County and that he directed the distribution of insurance commissions, he ar-

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[11] Margiotta's pretrial motion to dismiss was filed under a prior indictment that was superseded by an indictment filed on January 15, 1981. The principal change in the superseding indictment was the addition of the word "secret" before the description of the alleged fraudulent agreement between Margiotta and the Williams Agency. This superseding indictment has been the predicate for all subsequent proceedings.

gued that his behavior was merely a longstanding political patronage arrangement practiced for decades by Republicans and Democrats alike. As noted above, after deliberating carefully for more than a week, the jury announced that it could not agree on a verdict, and a mistrial was declared.

This court's second review of the Margiotta case followed Judge Sifton's declaration of the mistrial. In anticipation of another hotly contested battle at the retrial, the Government sought reconsideration of a number of legal and evidentiary rulings Judge Sifton had made at the first trial. The Government challenged Judge Sifton's instruction to the jury that for the Government to show Margiotta had defrauded the citizens of Nassau County and the Town of Hempstead of the right to have the affairs of those entities conducted honestly, free from corruption, fraud and dishonesty, in violation of the mail fraud statute as charged in Count One, the jury had to find that Margiotta owed some kind of special fiduciary duty to the citizenry.[12] The Government also sought reconsideration of the district court's related instruction that a violation of mail fraud under Count One required an additional showing of willful concealment.[13] Moreover,

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[12] The district court declined to adopt the Government's requested charge that a special fiduciary relationship need not be established for it to prove the first "prong" of Count One, which charged that Margiotta's scheme to defraud the citizens of Nassau County and the Town of Hempstead deprived them of the right to have the affairs of those entities conducted honestly, free from corruption, fraud, and dishonesty. The Government's requested instruction would have permitted the jury to find the defendant guilty of mail fraud simply on the basis of a determination that Margiotta had agreed to recommend the Williams Agency as Broker of Record in return for the Agency's participation in the kickback scheme, without reference to the question of a breach of a fiduciary relationship by the defendant.

[13] *See United States v. Margiotta*, 662 F.2d 131, 137 (2d Cir. 1981).

the Government contended that the district court erred in declining to instruct the jury that Margiotta could be found guilty, as a principal, of extortion under color of official right in violation of 18 U.S.C. § 1951. Instead, Judge Sifton instructed that Margiotta could be found guilty of extortion pursuant to 18 U.S.C. § 2(b) only if the jury found that he had caused public officials acting under color of official right to induce a victim to part with money.[14] The Government also took issue with certain evidentiary rulings made by Judge Sifton at the first trial.[15] The Government appealed from Judge Sifton's order stating that he would follow these rulings at the second trial. This Court affirmed the order on the evidentiary rulings and dismissed the appeal with respect to the challenged jury instructions on the ground that those portions of the order relating to the jury instructions were not appealable by the Government pursuant to 18 U.S.C. § 3731. *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981). In dismissing the Government's appeal with respect to the jury instructions, we explicitly stated we intended to express no views on the merits of those claims.

At the second trial, the Government again sought to prove that Margiotta's participation in the insurance activities amounted to an elaborate scheme of fraud in violation of the federal mail fraud and extortion statutes rather than a mere political patronage system. The Gov-

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[14] 18 U.S.C. § 2(b) (1976) provides in pertinent part:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[15] At the first trial, Judge Sifton had excluded (1) evidence that Margiotta's conduct violated New York law; (2) evidence of a prior similar act involving the dependence of employee salary increases on their agreement to contribute one percent of their salaries to the Republican Party; and (3) certain statements of appellant's attorneys in a memorandum submitted to the Attorney General in an attempt to persuade the Department of Justice that Margiotta should not be indicted.

ernment presented evidence to show that Margiotta had deeply insinuated himself into the affairs of government in the Town of Hempstead and Nassau County, to the point that he was in effect undertaking the business of government and not simply the activities of the Republican Party. This evidence was provided by testimony of Ralph Caso, who was the Presiding Supervisor of the Town of Hempstead until 1971 and Nassau County Executive until 1977. Caso stated that prior to his "break" with Margiotta in 1976, he was "controlled" by Margiotta in "the basic responsibilities that [he] was to carry out," including appointments to offices and positions such as the Broker of Record.

While Caso's successor, Francis Purcell, who still holds the office of Nassau County Executive, did not describe the same relationship of dominance over the affairs of government in Town and County, the testimony of Margiotta himself and those who carried out his directives established that the appellant exercised a vise-like grip over the basic governmental functions in Hempstead and Nassau County. In explaining his role in the selection of the Williams Agency for the position of Broker of Record, Margiotta testified that Richard B. Williams, an active participant in the political affairs of the Town of Hempstead and Nassau County, had approached him in 1968 and asked to replace Mortimer Weis as Broker of Record for the Town of Hempstead. Margiotta determined that the Williams Agency should replace Weis as the Broker of Record, and this decision was implemented by Caso. In 1971, after Ralph Caso was elected Nassau County Executive, Mr. Williams again approached Margiotta to express his desire to become Broker of Record for Nassau County. Margiotta testified that he determined the Williams Agency "deserved it above anybody else [he] thought was capable of handling it." On January 1, 1971, the day on which he took office, Ralph Caso designated the Williams Agency as Broker of Record for Nassau County based on Margiotta's recommendation.

Moreover, Margiotta's participation in the "governmental administration of insurance affairs" involved more than the selection of the Broker of Record. Margiotta himself testified that on one occasion he was directly involved in discussions concerning efforts to obtain insurance for the Nassau County Coliseum and the Veterans Hospital, and that he was consulted by Alphonse D'Amato, then Presiding Supervisor of the Town of Hempstead, about the possibility of adopting a self-insurance plan following inquiries by the New York State Investigation Commission. Insurance brokers Dowler and Curran corroborated this evidence of Margiotta's dominance in municipal insurance activities. They stated that when they sought the Town and County business, they undertook discussions with Margiotta, not with the public officials. After Margiotta declined their offers, they did not appeal to the public officials because, as broker Curran testified, "there was no place else to go." Margiotta's version of these discussions does not put the lie to the assertion he told Curran that "in view of [William's] party service I had no intention of taking any insurance away from him." Similarly, after Richard B. Williams, the founder of the Williams Agency, died in 1978, Margiotta testified that William's son, Richard A. Williams, approached him to ask whether the death of his father would affect their insurance arrangement. Margiotta stated that he would always "retain and recommend" the Williams Agency as Broker of Record. Moreover, Margiotta conceded that if the Williams Agency ever refused to follow his instructions concerning the distribution of portions of the insurance commissions, he would have convened a meeting of the Executive Committee of the Republican Party, and would have recommended that the Williams Agency be replaced as the Broker of Record.

The municipal insurance activities were not Margiotta's sole concern in participating in municipal government.

Margiotta also played a substantial role in making hiring and promotion decisions. Margiotta's activities as a de facto Department of Personnel for Nassau County were described at trial by Alfred G. Riehl, the program staffing officer of Nassau County, and Donald Woolnough, the Republican headquarters functionary who was Margiotta's administrative assistant. Mr. Riehl assumed his duties as program staffing officer following a meeting with Margiotta, at which the appellant directed Riehl to see Donald Woolnough. Riehl and Woolnough discussed the procedure for handling requests for employment, promotions and raises. In essence, Riehl was informed that whenever a position not covered by applicable civil service regulations became available, Riehl should notify Woolnough. Woolnough testified that he would "disseminate" those jobs paying less than $15,000 to local Republican Party leaders unless a number of jobs were made available at one time, in which case Margiotta would instruct Woolnough on which local political districts should receive the employment opportunities. According to both Woolnough and Margiotta himself, while Woolnough would interview applicants for positions as clerks, electricians and other types of laborers to be hired by the municipal government, Margiotta would interview individuals who were applying for the higher level positions, such as candidates for County or Town Attorneys and department heads. Riehl testified that he contacted Woolnough on all cases involving hiring, requests for promotions, and salary increases in excess of $1,500. Woolnough stated that he would convey the information to Margiotta, who would often direct him to check with the local leader. Margiotta would also personally approve or disapprove promotions and salary increases for Nassau County positions. According to Woolnough, Margiotta's approval would be based upon the individual's "political activity." If a request for a raise or promotion was denied, Riehl would simply inform the appropriate department head of the decision, but would not proffer any reasons for the denial.

Margiotta played a similar role in the government of the Town of Hempstead. Muriel DeLac, the Director of Personnel for the Town of Hempstead stated that she followed the "unvarying practice" of seeking approval of raises and promotions concerning positions with the Town of Hempstead by forwarding a request to Donald Woolnough at the Republican Committee. The requests would be returned with the notations, "approved" or "denied." According to Ms. DeLac, the only individuals approved for hiring were those referred by the leaders of the Republican Party. One of Woolnough's responsibilities was to obtain lists from Nassau County and the Town of Hempstead showing the names of all employees and the salary they earned. Armed with this information, Margiotta and his associates would study the relationship between the amount of money earned by an individual and the amount of money contributed to the Republican Party before approving or denying a request for a raise or promotion.[16] In short, Margiotta's role in the affairs of Nassau County and the Town of Hempstead may be summarized in the words of Donald Woolnough: "everything went through his hands."

According to the Government, Margiotta converted this control over the governments of Town and County into a

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[16] According to Andrew Parise, the Chief Executive Assistant to the Presiding Supervisor of the Town of Hempstead, it was "common knowledge" that an employee was expected to contribute one percent of his salary to the Republican Party. This expectation was enforced by the Party's control of the process governing raises and promotions. At the first trial the district judge had precluded the Government from describing the one percent system in detail on the ground that its probative value was exceeded by its prejudicial impact. As noted at page ——, after declaring a mistrial, Judge Sifton stated in an order that he would follow this evidentiary ruling at the second trial. On hearing the Government's appeal from this order, this Court affirmed on the ground that Judge Sifton acted well within his discretion in balancing the probative value and prejudicial impact. *United States v. Margiotta*, *supra*, 662 F.2d at 142.

scheme to defraud relating to the municipal insurance activities. The tale of Margiotta's allegedly corrupt agreement was recounted at trial by Richard A. Williams, son of Richard B. Williams, the founder of the Williams Agency and close political associate of Margiotta. In 1968 Williams accompanied his father to a meeting attended by Margiotta and Mortimer Weis. The younger Williams waited outside the meeting room. Later, Williams was advised by his father that the Williams Agency would be named Broker of Record for the Town of Hempstead and that the Agency had agreed to split its commissions on a "50-50 basis." Margiotta has conceded that this meeting was held. Moreover, the testimony of Williams that his father had agreed to set aside 50% of his commissions was corroborated by documents prepared by Williams and his father in 1969. These documents specified the amounts of commissions the Williams Agency had received, and showed, under a column labeled "50% of commissions," that the funds had been divided in half. The younger Williams testified that his father had a conversation with Margiotta prior to the appointment of the Williams Agency as Broker of Record for Nassau County. The Williams Agency continued to set aside 50% of the commissions it earned on Nassau County properties for distribution to Margiotta's political allies.

Through his control over the appointment process and other aspects of municipal government, Margiotta had thus generated a "slush fund," the proceeds of which could be distributed to purchase party loyalty, to assist friends, or, for purposes he designated, in his words, "whenever the spirit moved [him]." For example, attorney William Cahn, a former district attorney for Nassau County, was "retained" by the Williams Agency at a fee of $2,000 per month beginning in January, 1975 after Margiotta asked whether the Williams Agency could "see its way clear to retain [Cahn]." The Williams Agency paid William Cahn $24,000 per year in 1975 and 1976, and con-

tinued to pay $2,000 per month in 1977. In April, 1977, the Agency began making the payments to Cahn's son, Neil, after William Cahn told Margiotta that he wanted his son to receive the money. The Williams Agency deducted the payments to the Cahns from the amount allocated from the commissioners earned by placing insurance on Nassau County properties. Neither William nor Neil Cahn rendered any legal services on behalf of the Williams Agency.

Another beneficiary of the insurance scheme was Michael D'Auria, a former State Supreme Court Justice who was ultimately disbarred. Following Margiotta's approval, the Williams Agency made a series of payments totalling approximately $16,000 between 1971 and 1975 to D'Auria, who did no compensable legal work. Moreover, John Sutter, a Nassau County criminal lawyer, received payments derived from the insurance proceeds. Sutter represented Williams and several others, including Margiotta, William Cahn, Nassau County Executive Purcell, New York State Assemblyman Joseph Reilly, and Deputy Nassau County Executive Henry Dwyer, following inquiries by the New York State Investigation Commission and a grand jury into state insurance practices in 1977. Sutter never billed Margiotta or any of the other clients except the Williams Agency and Nassau County. Moreover, it appears that Sutter billed the Williams Agency for work incurred in representing one John Hansen in an unrelated state criminal matter, pursuant to instructions from Margiotta. Furthermore, the Government presented evidence that Margiotta had arranged for a payment of $5,000 to himself. Robert Dowler testified that Margiotta and Dowler agreed to split a payment of $10,000 made by the Williams Agency to Dowler.

To support its theory that the insurance arrangement was a scheme to defraud rather than a good faith patron-

age practice, the Government sought to prove that Margiotta tried to conceal the practice by directing the preparation of falsified property inspection reports by recipients of the kickback payments who did no meaningful work. According to the younger Williams, Margiotta convened a meeting with Williams in 1975, responding to the growing concern that the public exposure of the insurance activities would cause embarrassment to the Republican Party. As a result, from 1975 to 1978, the insurance brokers who received portions of the commissions earned by the Williams Agency were directed to make useless inspections of properties and to write unnecessary reports. Thus, it was made to appear that the recipients of the insurance proceeds were legitimately earning their commissions. In addition, the Government presented evidence showing that Margiotta attempted to disguise the insurance parties by misleading the State Investigation Commission when it inquired into the propriety of the insurance scheme in 1977 and 1978. Many of the recipients of the kickbacks, represented by a group of attorneys whose fees were paid by the Nassau County Republican Committee, misrepresented to the Commission the reason they were receiving the payments. The witnesses stated that they worked and performed services for the money they received. Margiotta himself testified that his conversation with Williams concerning the sharing of commissions in 1971 was motivated in part by the workload facing the brokers.

At trial, Margiotta maintained that, although he recommended the designation of the Williams Agency as Broker of Record and expected the Agency to continue the insurance patronage system, his recommendation was not made contingent upon a secret agreement to split the commissions on a "50-50 basis." Margiotta asserted that his practice of commission sharing among brokers was a good faith continuation of a long-standing and widely-known political patronage arrangement in New York. Margiotta argued that until 1978, no New York law prohibited the

sharing of municipal commissions among non-working brokers.[17] He emphasized that the insurance patronage scheme was discontinued after Governor Carey proposed a new State regulation requiring the performance of services by brokers receiving commissions. John F. English, former Nassau County Chairman of the Democratic Party, Palmer Farrington, past Presiding Supervisor of the Town of Hempstead, testified that the distribution of insurance commissions on municipal properties to non-working brokers was a patronage system practiced by both Democrats and Republicans in the County for decades. Margiotta further asserted that he was not responsible for the preparation of fictitious property inspection reports, and that he did not lie to the State Investigation Commission. After deliberating for several days, the jury empanelled for his second trial convicted Margiotta of mail fraud and five counts of extortion. We have set forth at some length the factual contentions of the Government and Margiotta so that the points raised on appeal may be considered against the background of the bitterly contested trial.

On appeal, Margiotta raises a cluster of arguments in support of his claims that his mail fraud and Hobbs Act convictions should be reversed and indictment dismissed. Moreover, he asserts that the trial court erred by admitting into evidence Richard A. Williams's account of his father's alleged agreement with Margiotta. We turn now to the merits of Margiotta's claims.

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[17] Moreover, Margiotta has called attention to an informal opinion rendered in 1943 by the General Counsel of the State Insurance Department concluding that a municipality could require a broker who placed municipal insurance to share his commissions with other brokers in the community. In response, the Government has noted a 1950 Insurance Department memorandum stating that commission sharing was desirable "in order to avoid political or other kinds of favoritism."

II. *Mail Fraud*

Margiotta asserts that his conviction of mail fraud (Count One) must be reversed and the indictment dismissed on the grounds that the federal mail fraud statute, 18 U.S.C. § 1341 (1976), does not embrace a theory of fiduciary fraud by private participants in the political process, and that Margiotta owed no fiduciary duty to the general citizenry of Nassau County or the Town of Hempstead upon which a mail fraud offense could be based. Count One alleged that Margiotta devised a scheme to defraud Nassau County and the Town of Hempstead, New York State, and the citizens of these jurisdictions, (1) of the right to have the affairs of those entities conducted honestly, free from corruption, fraud and dishonesty, and (2) of the honest and faithful participation of Margiotta in the governmental affairs of those entities. The basic factual underlying Count One was the allegation that Margiotta, who participated extensively in the selection of public officeholders in Hempstead and Nassau County, had entered into a secret agreement pursuant to which the Williams Agency was designated Broker of Record on the understanding that the Agency would kick back a substantial portion of its commissions in accordance with Margiotta's instructions. Margiotta argues that an alleged deprivation of an "intangible right" to a defendant's honest and faithful services forms a predicate for a federal mail fraud violation only where the defendant shares a fiduciary relationship with the putative victim. Asserting that a fiduciary duty to the general citizenry requiring honest and faithful participation in governmental affairs has been recognized only in cases involving defendants who are public officials, Margiotta concludes that the novel application of the mail fraud statute on an "intangible rights" theory to a non-office holder such as Margiotta represents an untenable and improper extension of the mail fraud statute beyond its permissible bounds.

In construing the elements of the mail fraud statute in this case of first impression, we tread most cautiously. As we have noted in another context, *see United States v. Barta*, 635 F.2d 999, 1005-06 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981), § 1341 is seemingly limitless on its face. We are not unaware of the time-honored tenet of statutory construction that ambiguous laws which impose penal sanctions are to be strictly construed against the Government. *Id.* at 1001. *See also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820). Concomitantly, it is indisputable that there are situations in which the legislature has intended to define broadly the scope of criminal liability. Our task today is complicated because the broad provisions of the mail fraud statute have been applied in a context implicating two conflicting sets of values, both of which merit stringent protections. On the one hand, the prosecution under § 1341 of those who simply participate in the affairs of government in an insubstantial way, or exercise influence in the policymaking process, poses the danger of sweeping within the ambit of the mail fraud statute conduct, such as lobbying and party association, which has been deemed central to the functioning of our democratic system since at least the days of Andrew Jackson. On the other hand, an unduly restrictive reading of § 1341, leading to the formulation of a rule that precludes, as a matter of law, a finding that a person who does not hold public office owes a fiduciary duty to the citizenry, regardless of that individual's de facto control of the processes of government, eliminates a potential safeguard of the public's interest in honest and efficient government. While we conclude that there are limitations on the application of the mail fraud statute to violations of the intangible right to "good government," we believe that the statute reaches the conduct evidenced by the appellant in this case.

A. *The applicability of the mail fraud statute.*

Margiotta argues that the mail fraud statute cannot, as a matter of law, embrace a theory of fiduciary fraud by private participants in the political process. Specifically, he emphasizes that although § 1341 has been applied to fiduciaries in both the public and private sectors, the fiduciary duty associated with the public's intangible right to an individual's honest and faithful participation in governmental affairs has been accepted only where the defendant is a public official. *See, e.g., United States v. Mandel*, 591 F.2d 1347, 1358 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976). We reject Margiotta's claim. In the private sector, it is now a commonplace that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property. *See United States v. Barta, supra*, 635 F.2d at 1005-06 (deprivation of employer's right to employee's honest and faithful services); *United States v. Buckner*, 108 F.2d 921 (2d Cir.), *cert. denied*, 309 U.S. 669, 60 S.Ct. 613, 84 L.Ed.2d 1016 (1940). Fraudulent schemes designed to cause losses of an intangible nature clearly come within the terms of the statute. *See United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982). A close reading of the statute supports this result. Section 1341 prohibits "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations or promises" [18] (emphasis added). Accordingly, the prohibition against schemes or artifices to defraud is properly interpreted to be independent of the clause "for obtaining money or property." *See United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909, 94

[18] *See* note 4, *supra*.

S.Ct. 2605, 41 L.Ed.2d 212 (1974). *But see* Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U.Chi.L.Rev. 562 (1980) [hereinafter "Comment—*Intangible Rights*"].

In the public sector, as the appellant correctly points out, the mail fraud statute has been employed in prosecutions of public officials who have allegedly deprived the citizenry of such intangible rights as the right to good government, or the right to the honest and loyal services of its governmental officers. A number of courts have approved the prosecution of allegedly corrupt politicians who did not deprive the citizens of anything of readily identifiable economic value. *See, e.g., United States v. Mandel, supra; United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed. 2d 746 (1976); *United States v. States, supra.* From these cases, a basic principle may be distilled: a public official may be prosecuted under 18 U.S.C. § 1341 when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political and civil rights of the general citizenry. The definition of fraud is thus construed broadly to effectuate the statute's fundamental purpose in prohibiting the misuse of the mails to further fraudulent enterprises of all kinds. *See United States v. States, supra*, 488 F.2d at 764. *See also* Comment—*Intangible Rights, supra*, at 564.

The instant case raises the novel issue whether an individual who occupies no official public office but nonetheless participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible political rights that may lay the basis for a mail fraud prosecution. In the private sector cases, a formal employer-employee relationship is not a prerequisite to a finding that a fiduciary duty is owed. *See, e.g., Oil & Gas Ventures—First 1958 Fund Ltd. v. Kung*, 250 F.Supp. 744, 749 (S.D.N.Y. 1966)

(Weinfeld, J.) (fiduciary relation may be founded upon dominance). Similarly, we do not believe that a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector. *Cf. United States v. Del Toro*, 513 F.2d 656, 663 & n.4 (2d Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975) (prosecution for conspiracy to defraud the United States in violation of 18 U.S.C. § 371).

The drawing of standards in this area is a most difficult enterprise. On the one hand, it is essential to avoid the Scylla of a rule which permits a finding of fiduciary duty on the basis of mere influence or minimum participation in the processes of government. Such a rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service. On the other hand, the harm to the public arising from the sale of public office and other fraudulent schemes leads us to steer a course away from the Charybdis of a rule which bars on all occasions, as a matter of law, a holding that one who does not hold public office owes a fiduciary duty to the general citizenry even if he in fact is conducting the business of government.

Although there is no precise litmus paper test, two time-tested measures of fiduciary status are helpful: (1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary. *See* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am.Crim.L.Rev. 117, 147 (1981) [hereinafter "Coffee, *From Tort to Crime*"]; *Cheese Shop Int'l, Inc. v. Steele*, 303 A.2d 689, 691 (Del. Ch.), *rev'd on other grounds*, 311 A.2d 870 (Del.Supp.

1973); *Mobil Oil Corp. v. Rubenfeld*, 72 Misc.2d 392, 399-400, 339 N.Y.S.2d 623, 632 (Civ.Ct. 1972), *aff'd*, 77 Misc.2d 962, 357 N.Y.S.2d 589 (1974), *rev'd on other grounds*, 48 A.D.2d 428, 370 N.Y.S.2d 943, 947 (2d Dep't. 1975), *aff'd mem.* 40 N.Y.2d 936, 390 N.Y.S.2d 57, 358 N.E.2d 882 (1976); *In re Jennings Estate*, 335 Mich. 241, 244, 55 N.W.2d 812, 813 (1952) (no fiduciary relationship absent a showing of confidence, trust and reliance); *Trustees of Jesse Parke Williams Hospital v. Nisbet*, 191 Ga. 821, 841, 14 S.E.2d 64, 76 (1941) (fiduciary status based on position of dominance and control); *Miranovitz v. Gee*, 163 Wis. 246, 249, 157 N.W. 790, 792 (1916) (reliance on superior knowledge of fiduciary); *see also United States v. Mazzei*, 521 F.2d 639 (3d. Cir.) (*en banc*), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed. 2d 385 (1975). These tests recognize the important distinction between party business and government affairs, permitting a party official to act in accordance with partisan preferences or even whim, up to the point at which he dominates government. Accordingly, the reliance and de facto control tests carve out a safe harbor for the party leader who merely exercizes a veto power over decisions affecting his constituency. *See* Coffee, *From Tort to Crime*, *supra*, at 147.

In light of these guidelines, the prosecution of Margiotta under the mail fraud statute was permissible, notwithstanding the fact that the appellant held no official public office. It cannot be gainsaid that Margiotta had a stranglehold on the respective governments of Nassau County and the Town of Hempstead. According to Donald Woolnough, one of Margiotta's principal assistants, "everything went through his hands." The evidence established not only that he was responsible for the administration of the municipal insurance activities, but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases. Others relied upon him for the

rendering of important governmental decisions, and he dominated governmental affairs as the de facto public leader. As a result, the federal mail fraud statute properly supported a prosecution for Margiotta's breach of at least a minimum duty not to sell his substantial influence and control over governmental processes.

Moreover, Judge Sifton's charge to the jury was consistent with the limitations we have delineated on the application of the mail fraud statute to participants in the political process who hold no public office. Judge Sifton did not simply instruct that the jury could find that Margiotta owed a fiduciary duty if he participated or had influence in Nassau County and the Town of Hempstead. Instead, the trial court charged that the jury should determine whether Margiotta's work "was in substantial part the business of Government, rather than being solely party business and that his performance of that work was intended by him and relied on by others in Government as part of the business of Government . . . ." This charge was harmonious with the guidelines we have articulated today, and ensured that the jury's consideration of the mail fraud count was properly channelled. *Cf. Penato v. George*, 52 A.D.2d 939, 942, 383 N.Y.S. 2d 900 (2d Dep't 1976) (reliance is an important factor in determining existence of fiduciary relationship), *appeal dismissed*, 42 N.Y.2d 908, 397 N.Y.S.2d 1004, 366 N.E.2d 1358 (1977); *Ahern v. Board of Supervisors of Suffolk County*, 17 Misc.2d 164, 171, 184 N.Y.S.2d 894 *rev'd on other grounds*, 7 A.D.2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959) (Party chairman participates in governmental function when nominating Commissioner of Elections).

Margiotta's argument that the legislative history does not support the application of the mail fraud statute to private participants in the political process, regardless of the extent to which they dominate the affairs of government, is unavailing. While the mail fraud statute, originally enacted as § 301 of the Act of June 8, 1872, ch. 335,

17 Stat. 283, 323, resulted from a recommendation of a committee of postal officials for legislation "to prevent the frauds which are perpetrated by lottery swindlers through the mails," [19] § 1341 has never been limited to this narrow purpose. *See* Coffee, *From Tort to Crime*, *supra*, at 123. Yet no legislative history exists to suggest that Congress has intended the mail fraud statute to deal only with schemes to defraud involving money or property, *see United States v. States*, *supra*, 488 F.2d at 764, let alone to be subject to a hard-and-fast distinction between public officeholders and dominant non-public officeholders in cases involving intangible political rights. Accordingly, our construction of § 1341 furthers the basic purpose of the statute in proscribing the use of the mails to promote fraudulent enterprises. *See Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896). *See generally Intent, Clear Statements, and the Common Law; Statutory Interpretation in the Supreme Court*, 95 Harv. L.Rev. 892, 893 (1982) (instrumental approach is one technique of statutory interpretation).

Furthermore, Margiotta's prosecution does not exceed the permissible bounds of the statutory language. More than five decades ago, the Supreme Court stated that the phrase "scheme to defraud" extends to "a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). In his brief, appellant has conceded that a deprivation of an intangible right to a defendant's honest and faithful services properly forms the basis for a mail fraud violation where the defendant owes a fiduciary duty to the alleged victim. As a result, while the question remains whether Margiotta owed a fiduciary duty to the general citizenry of the Town of Hempstead and Nassau County, there is no merit

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[19] Report of the Committee of Post Office Officials, 19-20 (March 30, 1870). *See* Comment, *The Intangible Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U.Chi.L.Rev. 562, 567-68 (1980).

to Margiotta's claim that the language of the federal mail fraud statute cannot embrace a theory of fiduciary fraud by one, like the appellant, who has de facto control over the process of government and is relied upon by others in the rendering of essential governmental decisions.

B. *Fiduciary Duty.*

Margiotta argues that, even assuming the applicability of the statute to his role in the insurance scheme, he owed no fiduciary duty to the general citizenry under federal or state law upon which a mail fraud violation could be predicated. At the outset, we reject his contention that absent a showing of a violation of New York statute or a duty imposed by New York law, a defendant may not be found guilty of using the mails in furtherance of a scheme to defraud on the basis of a breach of a fiduciary duty to the citizenry. The mail fraud statute was enacted to prohibit the use of the mails for promoting schemes deemed contrary to federal public policy. Early in the history of § 1341's interpretation, the Supreme Court stated that "Congress may forbid any such act done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not," since "[t]he overt act of putting a letter into the post office of the United States is a matter that Congress may regulate." *Badders v. United States*, 240 U.S. 391, 393, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916). Accordingly, a violation of local law is not an essential element of a scheme to defraud in contravention of 18 U.S.C. § 1341. *See, e.g., United States v. States, supra*, 488 F.2d at 767; *United States v. Mandel*, 591 F.2d at 1362. This principle applies to the question of fiduciary duty as well. In *United States v. Barta, supra*, 635 F.2d at 1007, we stated that an employee's duty to disclose material information to his employer need not be imposed by state or federal statute. Rather, the duty not to conceal, and in fact to reveal, material information could be deemed to arise from the employment relationship itself. *Id. See generally United States v. Bush*, 522 F.2d 641, 646 n.6

(7th Cir. 1975) (a conviction for mail fraud is not dependent upon a violation of state law), *cert. denied*, 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976). *But cf. Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479-80, 97 S.Ct. 1292, 1304, 51 L.Ed.2d 480 (1977) ("There may well be a need for uniform federal fiduciary standards... [b]ut those standards should not be supplied by judicial extension of § 10b and Rule 10b-5 [of the federal securities acts] . . . ."). Similarly, we need not examine state law to determine whether Margiotta's relationship of dominance in municipal government gives rise to certain minimum duties to the general citizenry. Justice Holmes once wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920). It requires little imaginative leap to conclude that individuals who in reality or effect are the government owe a fiduciary duty to the citizenry. Moreover such a conclusion merely construes the elements of a mail fraud violation and does not contravene the principle that there is no "federal common law of crimes." *Parratt v. Taylor*, 451 U.S. 527, 531, 101 S.Ct. 1908, 1910, 68 L.Ed.2d 420 (1981).

Theoretically, the application of the federal mail fraud statute to state and local political participants without reference to state law principles of fiduciary duty raises federalism concerns. Indeed, Margiotta has argued that if New York State does not require individuals who are not public officeholders to act in a disinterested manner, a federal court's application of such a requirement constitutes an improper intrusion into the governmental affairs of New York State, as well as the county and local governments. *See generally National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). We need not reconcile the principles of federalism with the mandate of the mail fraud statute because Margiotta owed a fiduciary duty to the citizenry of Hempstead and Nassau County under New York law.

It has been held in the New York courts that "[t]he county committee [of the Republican Party] and its chairman are . . . trustees of party interests for the registered voters of the party in that county." *In re Application of Roosevelt*, 9 Misc.2d 205, 160 N.Y.S.2d 747, 749-750 (Sup.Ct.), *aff'd*, 3 A.D. 988, 163 N.Y.S.2d 403 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 19, 171 N.Y.S.2d 841, 148 N.E.2d 895 (1958). The primary function of the Republican Party Committees is "the promotion of Republican candidates and policies. . . ." *Seergy v. Kings County Republican County Committee*, 459 F.2d 308, 310 (2d Cir. 1972). Margiotta argues that his fiduciary duty to the Republican Party, which arises from his position as a party officer, would be impaired by a finding of a fiduciary duty to the citizenry requiring disinterested conduct. But while his party position may have been the springboard to control of the municipal governments, it is his participation in government, not his party position, which creates his fiduciary duty to the citizens. New York law clearly distinguishes between "public officers" and "party officers." *See People ex rel. McMahon v. Clampitt*, 34 Misc.2d 766, 767, 222 N.Y.S.2d 23, 25 (Ct.Spec.Sess. City of New York 1961). The cases cited by Margiotta do not involve the question whether dominance over the affairs of government by an individual who is a party officer may create a fiduciary duty to the citizenry with respect to those affairs. In concluding that effective control over the processes of government may transform a mere party functionary into a public fiduciary under New York law, we are directed to § 3-502(2) of the New York Election Law. Under this section, the Chairman of the Nassau County Democratic and Republican Committees are given the authority to nominate a Commissioner of the Nassau County Board of Elections. In construing this section, one New York court has concluded that since, in making the nomination, the County Chairman participates in a governmental function, he is "to that extent a governmental officer and is subject to the same mandatory power of this

court when he fails to perform a duty imposed upon him by law." *Ahern v. Board of Supervisors of Suffolk County, supra*, 17 Misc.2d at 171, 184 N.Y.S.2d at 901. Accordingly, New York law supports the position that a party officer, who owes a duty to his party and its followers, may owe certain minimum duties to the public as well, as a result of the other obligations he assumes.

While Cardozo described the standard of behavior governing a fiduciary as "the punctilio of an honor the most sensitive," *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), such rhetoric does not assist in determining when a fiduciary duty arises. Judge Sifton, in his charge to the jury on the nature of the participation the jury had to find in deciding whether Margiotta had a special duty to disclose the corrupt agreement, adopted a standard consistent with two measures of fiduciary duty recognized under New York law. As noted above, the district court instructed the jury that it must determine whether the work done by Margiotta was "in substantial part the business of government, rather than being solely party business and that his performance of that work was intended by him and relied on by others in Government as part of the business of Government." This instruction reflects the concepts of reliance, and de facto control and dominance, which are at the heart of the fiduciary relationship. *See, e.g., Penato v. George, supra*, 52 A.D.2d at 942, 383 N.Y.S.2d at 904-05; *Mobil Oil Corp. v. Rubenfeld, supra*, 72 Misc.2d at 399-400, 399 N.Y.S.2d at 632; *Ahern v. Board of Supervisors of Suffolk County, supra. See generally* Coffee, *From Tort to Crime, supra*, at 147. Accordingly, the jury could properly find that Margiotta owed a special duty to the electorate under New York law.[20]

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[20] Moreover, the Government has contended that a fiduciary duty was created by New York Election Law § 17-158 (McKinney 1978), which proscribes the payment or receipt of valuable consideration in connection with "any nomination or appointment for any public

Moreover, these instructions did not differ to an impermissible extent from the prosecution's "theory" charged in the indictment, in violation of the Fifth Amendment principle mandating reversal when the grand jury indicts on one theory, and the petit jury convicts on another. *See, e.g., Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed2d 252 (1960). The Government's theory in the indictment, encapsulated in the two prongs of the charging paragraph, was that a finding of Margiotta's guilt could be predicated on his entering into an agreement which defrauded Nassau County and the Town of Hempstead of the right to have their affairs administered honestly. In response to the defendant's motion to dismiss, the Government contended that an individual who knowingly and in fact undertakes the business of governing a particular jurisdiction owes a duty of loyalty to the citizens just as does one who is formally elected to public office. As noted above, Judge Sifton did not simply charge that mere participation in government, in the form of consultation or recommendations concerning appointments or salary increases, was sufficient to create such a fiduci-

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office or place," and by New York Penal Law § 200.50 (McKinney 1975), which makes it unlawful for a public official or party leader to solicit or accept money in connection with nominations or appointments to "public office." Judge Sifton concluded that the position of Broker of Record for the Town of Hempstead and the County of Nassau is not a "public office" or "place" within the meaning of the New York statutes, and excluded evidence that Margiotta's conduct violated these statutes. On appeal by the Government prior to the second trial, we held that even if the position of Broker of Record for the Town of Hempstead or Nassau County were a "public office or place," Judge Sifton acted well within his discretion in concluding that the probative value of the evidence was outweighed by the danger of unfair prejudice and confusion of the issues. *United States v. Margiotta, supra*, 662 F.2d at 143. On this appeal, we decline to hold that Judge Sifton erred in concluding that the Broker of Record is not a "public office or place," but note that even if the Broker does not meet the definition of that phrase, these statutes provide analogous authority for a finding of fiduciary duty.

ary duty. Instead, he charged that the jury had to find that the "work done by [Margiotta] was in substantial part the business of Government rather than being solely party business and that the performance of that work was intended by him and relied on by others in Government as part of the business of Government in order to carry forward its affairs as a whole." This charge did not depart from the Government's "theory of the case." Indeed, having been put on notice by Judge Sifton prior to the second trial that the district court intended to charge as it did, Margiotta raised no objection that he would be tried on a theory never presented to the grand jury.[21] *See United States v. Garguilo*, 554 F.2d 59 (2d Cir. 1977). Since Judge Sifton's charge to the jury did not permit conviction "upon theories and evidence that were not fairly embraced in the charges made in the indictment," *id.* at 63, Margiotta did not suffer any prejudicial variance warranting reversal.[22]

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[21] We note that the Government did raise objections to the propriety of the charge on a number of other grounds.

[22] Margiotta raises an additional variance objection to Judge Sifton's jury instructions relating to Count One in which the jury was charged that if the Williams Agency were found to be a fiduciary based on its "participation in Governmental affairs" and if Margiotta had been a co-schemer with Williams in the breach of that duty, Margiotta could be convicted of mail fraud as a result of the non-disclosure of the corrupt agreement. We do not believe this instruction subjected Margiotta to any prejudicial variance. *See United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977). The charging paragraph of Count One detailed the participation of others, including the Williams Agency, in the fraudulent scheme to which Margiotta was a party in breach of a fiduciary duty to the citizenry. Moreover, Count One specifically referred to 18 U.S.C. § 2. While the Government principally focused on Ralph Caso in attempting to prove liability pursuant to 18 U.S.C. § 2, the Government throughout the trial emphasized the role of the Williams Agency in municipal insurance affairs. Accordingly, aiding and abetting of others, such as the Williams Agency, to breach a fiduciary duty owed by them to the public was a separate basis on which the charges in Count One could properly have been sub-

C. *Sufficiency of the evidence of fiduciary duty.*

Margiotta argues that the evidence was insufficient to support a finding of fiduciary duty to disclose his secret agreement to the public even under the trial court's instructions to the jury. His claim that the Government did not present sufficient evidence that he assumed governmental functions concerning municipal insurance affairs is plainly without merit. While one author has stated that those who "govern most make the least noise,"[23] the Government introduced ample evidence that Margiotta was deeply involved in governmental affairs. The detailed proof adduced at trial reveals more than a limited role in giving political clearance for certain high-level appointments, such as County or Town attorneys and deputy department heads. Indeed, the evidence, including the testimony of Margiotta himself, supports a reasonable inference that Margiotta dominated the administration of several basic governmental functions, including the municipal insurance activities and the selection of individuals to fill positions in government. As Donald Woolnough, one of Margiotta's principal assistants, testified, everything relating to hiring, salaries and promotions "went through his hands." Moreover, the testimony of Margiotta and the insurance brokers demonstrates that Margiotta wielded similar power with respect to the selection of the Broker of Record and the distribution of insurance commissions to

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mitted to the jury. Furthermore, a finding that the Williams Agency breached a fiduciary duty owed to the public as a result of an undisclosed corrupt agreement with Margiotta has support in the law, since the Broker for Nassau County and the Town of Hempstead, like any broker, is an agent of his principal, in this case the municipalities, *see Bohlinger v. Zanger*, 306 N.Y. 228, 231, 117 N.E.2d 338, 339 (1954); New York Insurance Law § 111(2) (McKinney 1981 Supp.), and owes a duty of loyalty and good faith to this principal, including an obligation to exercise good faith and reasonable diligence in procuring insurance on the best terms he can. *See generally* 29 N.Y.Jur., Insurance § 468.

[23] J. Selden, Table-Talk: Power-State.

political allies. Williams met with Margiotta to arrange for the designation of the Williams Agency as Broker of Record. Insurance brokers approached Margiotta, not the individuals who officially held public office, to seek the municipal insurance business. From the selection of the Broker of Record, to such matters as obtaining insurance for particular municipal facilities and approving an alteration in the methods of obtaining insurance, as well as designation of the recipients of the insurance commissions generated on municipal properties, it was reasonable to infer that Margiotta undertook the business of government in administering the insurance and other affairs of Hempstead and Nassau County.

Furthermore, Margiotta claims that the evidence was insufficient to prove that he made any "impartial" undertaking that could lay the basis for a breach of fiduciary duty. Admitting that he always acted in a strictly partisan political role, and that his sole responsibility was to promote the election of Republican candidates and the health of the Republican Party, Margiotta asserts that there was a complete failure of proof to show that in recommending the Williams Agency as the Broker of Record, he made any representation that his decision was distinterested, impartial, or the result of a determination based on merit. This argument is misdirected. The breach of fiduciary duty on which his mail fraud prosecution has been predicated is not his failure to make decisions on the basis of merit, or on any misrepresentation or omission concerning his partiality. Rather, the crux of Margiotta's impropriety is the secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies. Ample evidence, including the testimony of Richard A. Williams and Margiotta himself, supports the Government's contention that this secret deal was struck and followed over the course of several years.

Finally, Margiotta argues that even if it could be found that he was a fiduciary and this arrangement with the Williams Agency existed, the evidence did not establish that he had an affirmative duty to disclose information to County or Town officials concerning the basis for his recommendation of the Agency as Broker of Record. The district court instructed the jury that in order to decide that Margiotta breached his fiduciary duty, it had to find that Margiotta had concealed "from those in Government who rely on his participation" material information concerning his entry into a corrupt agreement "to influence him in the performance of his governmental functions." It is undisputed that a defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information. *See, e.g., United States v. Newman*, 664 F.2d 12 (2d Cir. 1981); *United States v. Barta, supra*, 635 F.2d at 1006; *United States v. Bush, supra*, 522 F.2d at 648 (city employee could be convicted of mail fraud for depriving city and its citizens of his honest and faithful services when such deprivation is combined with material misrepresentations and active concealment). An affirmative duty of disclosure need not be explicitly imposed, but may be implicit in the relationship between the parties. In *Barta*, this Court stressed that an employee's duty to disclose material information to his employer need not be the creation of a state or federal statute. On the contrary, the employment relationship itself may give rise to an obligation on the part of an employee not to conceal, and in fact to reveal information material to his employer's business. *United States v. Barta, supra*, at 1007. *See also United States v. Bush, supra.*

In this case, an affirmative duty to disclose could reasonably be inferred from the de facto employer-employee relationship Margiotta enjoyed with the municipal government. Margiotta regularly participated in the selection

of persons for public positions in Nassau County. Having undertaken basic functions of government, he owed at least a duty to disclose material information or give notice of his conflict of interest to those in the government who relied upon him, just as an employee, under *Barta*, may owe his employer a duty to disclose material information. In addition to the evidence of non-disclosure of Margiotta's agreement with the Williams Agency, the Government presented evidence that Margiotta failed to disclose the corrupt arrangement during the State Investigation Commission's inquiries, during which he portrayed the artifice as an ordinary patronage practice. As a result, ample evidence supports a finding that Margiotta assumed an affirmative duty of disclosure, and breached it by his failure to disclose material information.

D. *Alleged First and Fourteenth Amendment limitations on the mail fraud conviction.*

Margiotta argues that the trial court's fiduciary doctrine impairs important rights of free expression and association, as well as the right to petition government to effect political or social change. He asserts that Judge Sifton's instructions apply to all persons influencing government. As a result, Margiotta argues, the trial court's construction of § 1341 brings within the statute's ambit "the entire spectrum of political participation" in governmental affairs, and thus criminalizes a substantial amount of constitutionally protected conduct. *See Grayned v. Rockford*, 408 U.S. 104, 114-15, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). Such overbroad regulation, Margiotta continues, carries the potential of significant chill arising from the likelihood of criminal prosecution. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Furthermore, according to the appellant, requiring a political party or its chairman to act as a "disinterested fiduciary" for the general citizenry abridges the cherished right of freedom of political associ-

ation. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 102 S.Ct. 434, 436 (1981). Moreover, Margiotta alleges, the imposition of criminal liability pursuant to the district court's fiduciary doctrine eviscerates the right of petition by interfering with the efforts of political party leaders freely to lobby government officials on behalf of their supporters. *See generally United Mine Workers v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) (First Amendment protects concerted efforts to influence public officials).

If the indictment and prosecution of Margiotta for mail fraud on the basis of his breach of fiduciary duty to the citizenry meaningfully implicated First Amendment interests, we would be loathe to approve such an application of the mail fraud statute. One of the essential purposes of the First Amendment is to protect the unfettered discussion of governmental affairs, *see Mills v. Alabama*, 384 U.S. 214, 218-19, 86 S.Ct. 1434, 1436-37, 16 L.Ed.2d 484 (1966), and the activities of lobbyists and others who seek to exercise influence in the political process are basic in our democratic system. The First Amendment concerns raised by Margiotta, however, are a chimera. Count One of the indictment and the pertinent jury instructions do not address mere participation in the political process or protected conduct such as lobbying or party association. Rather than resting on a generalized breach of duty to render distinterested services on the part of one who participates in the political process in some unspecified way, the indictment and prosecution focused on whether Margiotta's corrupt agreement breached a fiduciary duty which Margiotta owed as a result of his significant role in the governance of Hempstead and Nassau County. Since the conduct charged in the Indictment was within the power of the United States Government to proscribe and there is no indication that the application of the mail fraud statute in this specific case would deter protected political

activities in other contexts, the prosecution of Margiotta under Count One did not violate the First Amendment. *See Broadrick v. Oklahoma, supra*, 413 U.S. at 615, 93 S.Ct. at 2917. Moreover, there is simply no authority for the proposition that a conviction should be reversed and an indictment dismissed because the underlying "theory" of the case may be misused in other situations and misapplied to constitutionally protected conduct.

En passant, in response to Margiotta's contention that other political leaders are in jeopardy of prosecution, we believe his argument overlooks our narrow construction of the mail fraud statute. The necessity of meeting our restricted tests for the existence of a duty as a government fiduciary on the part of those who technically hold no public office precludes the use of § 1341 for dragnet prosecutions of party officials.

We need only briefly consider Margiotta's argument that the mail fraud statute is impermissibly vague both on its face and as applied to the facts of this case. Section 1341 has withstood repeated challenges which have raised the claim that it does not provide fair notice and warning of the conduct proscribed by the statute. *See, e.g., United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978). The broad language of the statute, intended by Congress to be sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising, is not unconstitutionally vague because § 1341 contains the requirement that the defendant must have acted willfully and with a specific intent to defraud. *See Screws v. United States*, 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945); *United States v. Manfredi*, 488 F.2d 588, 602 (2d Cir. 1973), *cert. denied sub. nom., LaCosa v. United States*, 417 U.S. 936, 94 S.Ct. 2651, 41 L.Ed.2d 240 (1974). Judge Sifton appropriately charged the jury on this element of the offense. Moreover, Margiotta knew that the conduct reached was likely

to be contrary to law, since he conceded at trial that a corrupt agreement pursuant to which he recommended the Williams Agency on the condition that the Agency kick back fifty percent of its commissions could be illegal. In light of the inclusion of payments to non-brokers in the scheme, the application of the mail fraud statute to his artifice should have come as no surprise. As a result, although he may not have anticipated the precise legal theory according to which the insurance ruse was deemed fraudulent, Margiotta was given fair warning that his activities could cause him to run afoul of the federal mail fraud statute.

E. *Material Information.*

Margiotta argues that he did not fail to disclose material information in violation of the mail fraud statute. Since the violation of an affirmative duty to disclose material information coupled with a breach of fiduciary duty violates § 1341, *see United States v. Newman, supra*, 664 F.2d at 19; *United States v. Barta, supra*, 635 F.2d at 1006, Margiotta claims that his conviction must be reversed because the information concerning the insurance scheme he allegedly failed to disclose was not material, for, as he asserts, any broker would not and could not reduce commissions. This assertion simply flies in the face of the evidence. The Williams Agency obviously was willing to work for less than the amount of the commissions paid by the municipalities, since it was relinquishing portions of the commissions as kickbacks to be distributed to Margiotta's political allies. If responsible officials in the Town and County had known of the secret deal, the concealment of which excluded potential bidders whose competition might have lowered the price to the public, the municipalities could have derived significant savings. Since the concealment of the insurance arrangement deprived

the public of a potential [24] reduction in the costs of owning property, the information withheld by Margiotta was material. Accordingly, this case is unlike *United States v. Ballard*, 663 F.2d 534, 542 (5th Cir. 1981), in which the court decided that the information withheld by the alleged "fiduciaries" was not material on the ground that "the price paid would have been unaffected by . . . disclosure."

Moreover, Margiotta's reliance upon § 188 of the New York Insurance Law is misplaced. That section prohibits a broker from rebating any portion of his commission directly to the insured. New York Insurance Law § 188 (McKinney 1966). In this case, the issue is not whether a broker would have rebated a part of his commission to the insured, the municipality, but whether it was possible that the responsible officials could have found a broker who would have been willing to accept a lower commission. On appeal, Margiotta has conceded that "a broker could theoretically agree to accept a lower commission," although he emphasizes that a witness, one Alfred Jaffee, testified at trial that a broker would not reduce its premium rate for only one municipality within a particular rate classification. On cross-examination, Jaffee admitted that a broker's commission could be reduced, and Richard A. Williams himself testified that on a few occasions, he reduced the commissions on policies written for the Town of Hempstead or Nassau County. Accordingly, the information concerning Margiotta's special arrangement appears to have been highly material.

Since all of Margiotta's claims concerning the mail fraud count are without merit, we affirm the judgment of conviction of mail fraud in violation of 18 U.S.C. § 1341.

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[24] There is no requirement that the public actually suffer a tangible harm, *see United States v. Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981); the prosecution need only prove that some actual harm or injury was contemplated, *see United States v. Dixon*, 536 F.2d 1388, 1399 n.11 (2d Cir. 1976).

III. *Hobbs Act Convictions.*

A. *Extortion.*

Margiotta argues that his conviction under Counts Two through Six charging violations of the Hobbs Act, 18 U.S.C. § 1951, should be reversed and the indictment dismissed. Section 1951 proscribes various kinds of extortionate interference with interstate commerce, and defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1976). Margiotta was charged with violating the Act by inducing the Williams Agency to make payments by means of wrongful use of "fear," and alternatively "under color of official right." Judge Sifton instructed the jury that it could find Margiotta guilty if it decided that he had employed one of these two methods. We find no error infecting Margiotta's conviction on five counts of extortion.

B. *Extortion "under color of official right."*

Extortion "under color of official right" is committed when a public official makes wrongful use of his office to obtain money not due him or his office. *United States v. French*, 628 F.2d 1069, 1072 (8th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); *United States v. Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). The public officer's misuse of his office supplies the necessary element of coercion, and the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear. *See United States v. Mazzei*, *supra*, 521 F.2d at 644. The district court concluded that although Margiotta was not a public official, he could be found guilty of extortion "under color of official right" pursuant to 18 U.S.C. § 2(b), which provides:

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Judge Sifton charged the jury that if it determined "that the defendant willfully and knowingly caused officials of the Town of Hempstead and County of Nassau under color of office to contribute in a substantial way to inducing the Williams Agency to consent to pay out the moneys . . . then the defendant is as responsible for the official action as if he was himself the public official concerned and had performed the action directly."

Margiotta asserts that the district court erred in applying 18 U.S.C. § 2(b) to this case because it was not shown that Margiotta had caused a public official to commit extortion "under color of official right" in violation of the Hobbs Act and because the trial court's instructions were improper. We disagree, and conclude that the requirements of 18 U.S.C. § 2(b) were met. This section is based on the precept that an individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime, notwithstanding that the proscribed conduct is achieved through the actions of innocent intermediaries.[25] *United States v. Kelner*, 534 F.2d 1020, 1022 (2d Cir.), *cert. denied*, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). *See also United States v. Giles*, 300 U.S. 41, 48-49, 57 S.Ct. 340, 344, 81 L.Ed. 493 (1937). It is unnecessary that the intermediary

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[25] As a result, 18 U.S.C. § 2(b) accomplishes a different result from that intended through 18 U.S.C. § 2(a) (1976), which provides in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

One cannot aid and abet another to do an innocent act within the meaning of § 2(a). *See United States v. De Cavalcante*, 440 F.2d 1264, 1268 (3rd Cir. 1971).

who commits the act have a criminal intent. *United States v. Kelner, supra*, 534 F.2d at 1023; *United States v. Bryan*, 483 F.2d 88, 92 (3rd Cir. 1973) (*en banc*). In causing the innocent intermediary to commit the challenged actions, the individual adopts both the intermediary's act and his capacity. *See, e.g., United States v. Ruffin*, 613 F.2d 408, 415 (2d Cir. 1979); *United States v. Wiseman*, 445 F.2d 792, 795 (2d Cir.), *cert. denied*, 404 U.S. 967, 92 S.Ct. 346, 30 L.Ed.2d 287 (1971). Section 2(b) has been broadly interpreted to cover not only the voluntary acts of a defendant's agents, but also involuntary conduct on the part of his victims. *See United States v. De Cavalcante*, 440 F.2d 1264, 1268 (3rd Cir. 1971). These principles are consistent with Congressional intent. The House Report accompanying an earlier version of § 2(b) stated that one of the principal purposes of the section was to eliminate any doubt that an individual who "causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal," in accord with such judicial decisions as *United States v. Giles, supra*. H.Rep.No. 304, 80th Cong., 1st Sess. 2442-49 (1949). *See generally United States v. Ruffin, supra*, 613 F.2d at 412-16.

In light of these guidelines, Margiotta could be found guilty of extortion pursuant to 18 U.S.C. § 2(b). One of the indispensable elements in the extortion kickbacks from the Williams Agency was the official act of Ralph Caso and other public officials of Nassau County and the Town of Hempstead in appointing and retaining the Williams Agency as Broker of Record. Had that conduct, which the jury could reasonably find from the evidence was caused by Margiotta, never occurred, the Williams Agency would not have been in a position to make the challenged payments. If the public officials were aware that the Agency was making the kickbacks at the direction of Margiotta as a result of their exercise of official power in designating and retaining the Agency as Broker, the

public officials could have been found guilty of extortion as principals, for unlawfully obtaining the consent to the payments under color of official right. *See, e.g., United States v. Butler*, 618 F.2d 411 (6th Cir.), *cert. denied*, 447 U.S. 927, 100 S.Ct. 3024, 65 L.Ed.2d 1121 (1980); *United States v. Trotta, supra.* In light of Ralph Caso's testimony that he was unaware of any commission sharing by the Williams Agency and the absence of proof, or contention by the Government, that Caso was party to the secret understandings concerning the designation of the Agency as Broker of Record for Town and County, it is likely that the public officials could not be found guilty of a Hobbs Act violation under color of official right, since it could not be established they were aware that Margiotta had caused them to exercise their power in a manner which induced the Williams Agency to make the kickbacks. Nonetheless, the defendant who caused them to act in this way is viewed as having "adopt[ed] not only [their] act but [their] capacity" as well. *United States v. Ruffin, supra*, 613 F.2d at 415. *See also United States v. Wiseman, supra* (defendants, who were private process servers, could be found guilty of 18 U.S.C. § 242, which prohibits those acting "under color of any law" from depriving citizens of their civil rights, by operation of 18 U.S.C. § 2(b), where the defendants had caused a state employee, the Clerk of the New York City Civil Court, to enter judgments against third persons, although the Clerk did not know that the judgments were fraudulently obtained); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967). Since Margiotta could reasonably be found to have caused a public official to commit the act necessary for inducing the Agency's consent to make the kickback payments, he could be convicted of extortion pursuant to the provisions of 18 U.S.C. § 2(b), even though the public official may have been a mere innocent intermediary, and did not participate in all aspects of the extortionate enterprise that is the subject matter of the criminal offense.

See United States v. Wiseman, supra. These principles were reflected in Judge Sifton's careful jury instruction, that the jury would have to find that Margiotta had "caused officials of the Town of Hempstead and Nassau County under color of office to contribute in a substantial way to inducing the Williams Agency to consent to pay out the monies referred to in Counts Two through Six."

In short, the jury could reasonably find that Margiotta had caused public officials in Hempstead and Nassau County to appoint and retain the Williams Agency as Broker of Record, a prerequisite step in the process of extorting insurance payments. The insurance commissions simply could not have been generated but for this official action. Moreover, this conclusion is not undercut by Margiotta's other arguments in support of his claim that he could not be found guilty of obtaining money under color of official right pursuant to 18 U.S.C. § 2(b). His contention that there is no proof that the Presiding Supervisor of the Town of Hempstead or the Nassau County Executive attempted to induce the Williams Agency to make the payments or that the Agency was motivated to make the kickbacks as a result of "the assertion of pressure" by the public officials is unavailing. Affirmative pressure in the form of force, fear, or direct solicitation of money may transform an official's act into a violation of the Hobbs Act, but it is the utilization of the power of public office to induce consent to the payments that is the gist of an offense of obtaining money "under color of official right." *See, e.g., United States v. Jannotti,* 673 F.2d 578 (3rd Cir.) (Hobbs Act covers actions by public officials under color of official right even when payment is not obtained by force, threats or use of force), *cert. denied,* —— U.S. ——, 102 S.Ct. 2906, 72 L.Ed.2d —— (1982). The use of public office, with the authority to grant or withhold benefits, takes the place of pressure or threats. In this case, the appointment and retention of the Agency as Broker of Record thus satisfies the requirement

of a use of public office or action "under color of official right." Moreover, it is clear that the victim's "motivation for the payment" of portions of the insurance commissions focused on the public officials' power of office. *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975). It is reasonable to conclude that the Williams Agency consented substantially for the reason that the positions held by the public officials, who were controlled by Margiotta, gave the officials the power to choose another as Broker of Record if the Agency did not consent to the payments. *See United States v. Hedman*, 630 F.2d 1184, 1194 n.4 (7th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

Furthermore, it is not necessary to support a Hobbs Act charge by showing that a public official offer a *quid pro quo* in the form of some specific exercise of the powers of his office or a forbearance to carry out a duty; a public official may be guilty of obtaining money under color of official right if the payments are motivated as a result of his exercise of the powers of his public office and he is aware of this fact. *United States v. Trotta*, *supra*, 525 F.2d at 1100. While the lack of awareness on the part of the public officials may have relieved them of criminal liability for extortion under color of official right, it does not relieve Margiotta of criminal responsibility, for, pursuant to 18 U.S.C. § 2(b), he could be found guilty of having caused the public officials unknowingly to use their power of office in such a manner that would induce the payments. *See United States v. Wiseman*, *supra*. In addition, Margiotta may not seek refuge in the claim that Ralph Caso and the other public officials were not themselves the recipients directly or indirectly of payments by the Williams Agency, and therefore did not make "wrongful use of [public office] to gain personal financial reward." *United States v. Butler*, *supra*, 618 F.2d at 419. A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political

allies and political parties, rather than to the public official who has acted under color of official right. *See United States v. Trotta, supra,* 525 F.2d at 1098 n.2. Finally, the focus of the prosecution on the actions of Margiotta in causing public officials unknowingly to use their power in such a way as to induce the Williams Agency to make kickbacks to Margiotta's political allies and the carefully drawn instructions of the district court ensured that Margiotta's prosecution under the Hobbs Act did not draw within its ambit conduct that has traditionally been viewed as legitimate lobbying and political activity. Since Judge Sifton specifically charged that Margiotta could be convicted only if the jury found that he had acted with the requisite criminal intent, the application of the Hobbs Act's proscription of extortion "under color of official right" by operation of 18 U.S.C. § 2(b) in this case does not open a Pandora's box of liability in connection with lobbying or other legitimate political activities.

C. *Extortion through wrongful use of "fear."*

As noted above, Judge Sifton alternatively instructed the jury that it could find Margiotta had violated the Hobbs Act by extortion through wrongful use of fear. Margiotta claims that the evidence was insufficient as a matter of law to establish that the payments made by the Williams Agency were induced by the wrongful use of fear. In light of the overwhelming evidence that the principals of the Williams Agency understood the Agency would lose its position as Broker of Record for Town and County if it ceased making the payments specified in Counts Two through Six, Margiotta's claim is plainly without merit.

Richard A. Williams first testified about his state of mind when he was called as a witness before the New York State Investigation Commission. When asked what would happen if he did not make the payments to other

insurance brokers, Williams responded that he believed the municipal insurance business would be distributed to someone else, and that he would be "excluded." Williams's testimony at trial concerning his state of mind in making the challenged payments was generally consistent with this prior testimony, and was sufficient for a reasonable jury to find that the principals of the Williams Agency had reasonably been induced to fear that the Agency's participation as Broker of Record would be terminated if it did not make the payments in accordance with Margiotta's directions. *See, e.g., United States v. Brown*, 540 F.2d 364, 373 n.6 (8th Cir. 1976); *United States v. Provenzano*, 334 F.2d 678, 687 (3rd Cir.), *cert. denied*, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964). Proof that the Williamses' fear was reasonable includes Margiotta's own statement that he would convene a meeting of the Executive Committee of the Republican Party in the event that the Agency ceased making payments. Moreover, putting the victim in fear of economic loss can satisfy the element of fear required by the Hobbs Act. *See United States v. Brecht*, 540 F.2d 45, 52 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977). Since the parties to the agreement understood this would be the result, Margiotta was able to exploit the fear of the brokers and thereby wrongfully obtain portions of their insurance commissions with their "consent." *See United States v. Furey*, 491 F.Supp. 1048, 1061 (E.D.Pa.), *aff'd without opinion*, 636 F.2d 1211 (3d Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 304 (1981). That the Agency concealed its practice of reducing the amount of kickbacks as the size of the commissions increased corroborates the finding that the Agency feared the loss of the municipal insurance business if Margiotta learned that the Agency was reneging on the secret deal to divide the commissions on a "50-50 basis."

We note that the evidence is particularly compelling as to Count Three which charged extortion in connection

with the payments to William and Neil Cahn, and Count Five, which set forth a Hobbs Act violation arising from payments to former Assemblyman Reilly. Margiotta directed a series of monthly payments in the amount of $2,000 to attorneys William Cahn and his son, as an alleged legal retainer by the Williams Agency. Margiotta admitted that payments to lawyers were not part of any prior patronage system. Moreover, on several occasions, Richard A. Williams approached Margiotta to determine whether the Agency could stop making payments to Cahn. In 1976, Williams asked Margiotta if the Agency should continue to make the payments, and Margiotta responded in the affirmative. Later, in 1978, after continuing to pay the monthly $2,000 kickbacks, Williams again sought Margiotta's permission to halt the payments. Although Margiotta initially agreed, Cahn appealed to Margiotta, and Williams was directed to commence making the payments again. After Williams's third request, in 1979, Margiotta gave his permission to cease making payments to the Cahns. At trial, Margiotta admitted that his recommendation was relevant to Williams's decision to continue to make the monthly payments. Although Williams testified that he had a high opinion of Neil Cahn's legal abilities, he stated that the work done by William Cahn for the Williams Agency was "insubstantial." Accordingly, ample evidence supports the inference that the Cahn payments were induced by a reasonable fear stemming from Margiotta's power to ensure the Williams Agency would suffer adverse consequences if it did not follow his directions.

Count Five was based upon a series of payments totalling approximately $50,000 to Assemblyman Reilly in 1979 and 1980, after Margiotta allegedly terminated the practice upon which he and Williams had agreed many years earlier. In 1978, according to Margiotta himself, he met with Williams to determine whether Williams "could see his way clear" to continue Reilly as an employee at a salary of $25,000 each year. During the sev-

eral years Reilly was paid by the Agency, he performed no meaningful work, and generated only a few hundred dollars in commissions. Williams testified that he understood the Agency could lose the municipal insurance business if the Agency did not continue to make the payments to Reilly.

In light of this evidence, the jury could reasonably find that the principals of the Williams Agency were induced to make the payments by the fear they would lose their position of Broker of Record if they did not comply with Margiotta's instructions. The jury could properly disbelieve Williams's isolated answer of "no" in response to a question whether he had "any state of mind of fear at the time [he] made any of these payments," and that, instead, he distributed portions of the commissions earned by the Agency because he understood that he had "to live up to" a verbal contract between the elder Williams and Margiotta. In his testimony, Williams repeatedly made clear his belief that the Agency would have lost the municipal insurance commissions if it had breached its secret agreement with Margiotta. Moreover, the jury could reasonably infer that Williams did not believe he was carrying out a "valid contract" from the evidence of Williams's participation in the creation of fictitious property inspection reports, his dissembling testimony before the New York State Investigation Commission, and the decision to reduce the portions of the commissions distributed from the agreed upon fifty percent. *Cf. United States v. Barber*, 668 F.2d 778, 783 n.2 (4th Cir. 1982) (falsification of documents amply supports inference that donations were compelled, not voluntary, campaign contributions).

Furthermore, there is no merit to Margiotta's claim that he could not have induced the Williams Agency to consent to the payments through the wrongful use of fear because the Williams Agency initially approached him to secure the positions of Broker of Record for Hemp-

stead and Nassau County and therefore was a "willing collaborator." *See United States v. Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979). Margiotta relies upon dictum in *United States v. Brecht*, *supra*, 540 F.2d at 51, in which the court stated that extortion under the Hobbs Act "involves initiative on the part of the defendant and coercion on the part of the victim." The court made this statement for the purpose of distinguishing bribery and extortion, not for the purpose of holding that a defendant cannot be guilty of extortion when the victim has taken the initiative, even if the victim was induced by fear to make the initial approach. We believe extortion under the Hobbs Act encompasses just such a situation, and well-reasoned precedent confirms our view. *See United States* v. *Duhon*, 565 F.2d 345, 351 (5th Cir.) (agreement of putative victims to offer union leaders money to remove pickets prior to meeting with the union leaders does not preclude a finding that the defendants intended to obtain money from the victims through wrongful use of fear; "[t]he extortionist need not explicitly demand property before it is offered"), *cert. denied*, 435 U.S. 952, 98 S.Ct 1580, 55 L.Ed.2d 802 (1978); *United States v. Hathaway*, 534 F.2d 386 (1st Cir.) (although the victim may have initiated the subject of payments, the jury could find that such approach arose from a reasonable fear that without paying he would not be considered by the authority), *cert. denied sub nom., Baptista v. United States*, 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed. 2d 79 (1976). In this case, the elder Williams was aware that kickbacks were essential for the Williams Agency to secure and retain the position of Broker of Record. Indeed, "prior practice" was Margiotta's principal defense to the charge of mail fraud in Count One. Moreover, Margiotta acknowledged that the Williams Agency faced the prospect of losing the municipal insurance business if it ceased making the payments. The jury could reasonably find that in this atmosphere of coercion, the Wil-

liams Agency labored under a well-founded fear that without agreeing to pay, and continuing to pay once appointed Broker, it would not be considered by the "authority" representing the Town and County: Joseph Margiotta. In short, as appellant's counsel stated at oral argument, the elder Williams agreed to the secret kickback arrangement because he was "doing what he had to do to get the business." Accordingly, the evidence is sufficient to support a finding that Marigotta was guilty of extortion in violation of 18 U.S.C. § 1951 through the wrongful use of "fear."

Since the jury could properly have found Margiotta guilty on Counts Two through Six either by a theory of extortion under color of official right or by a theory of extortion through the wrongful use of fear, both of which were included by Judge Sifton in his jury instructions, it is not necessary to consider Margiotta's argument that reversal of the jury's verdict is required unless both were correct as a matter of law and supported by the record. *See United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981). Moreover, the district court's instructions on the mail fraud count, which we believe were correct in all respects, did not prejudice the jury's consideration of the extortion charges in Counts Two through Six. Margiotta argues that Judge Sifton, in charging on the mail fraud count, instructed the jury that Margiotta was essentially a public official with a public official's fiduciary duty to render honest and loyal services to the general citizenry, and that this impaired his defense that he was not acting "under color of official right," under the Hobbs Act. This claim is without merit. Judge Sifton's charge on Count One did not state that Margiotta was essentially a public official. Moreover, in its instructions on Counts Two through Six, the district court explained that Margiotta was not a public official and the liability on the Hobbs Act counts could only be based on 18 U.S.C. § 2(b).

IV. *Admission of Williams's hearsay statements.*

Margiotta's final claim is that the trial court erred by admitting into evidence Richard A. Williams's hearsay account of his father's alleged agreement with Margiotta. Since the alleged secret agreement was forged at a 1969 meeting attended by the elder Williams, now deceased, Margiotta and Weis, the Government sought to prove the existence of this agreement in large part through the testimony of the younger Williams, who had waited outside the meeting room. At trial, the district court permitted Williams to describe his father's (the declarant's) purported account of the agreement reached at the meeting, over objection by Margiotta's counsel. Williams first recounted his father's plan to offer fifty percent of the Williams Agency's commissions to Margiotta if the latter secured the Town of Hempstead's insurance business for Williams. Judge Sifton admitted this hearsay testimony pursuant to the "state of mind" exception to the hearsay rule, Federal Rules of Evidence, Rule 803(3),[26] as a statement of the decedent's "design" or "plan." *See also United States v. Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961). Margiotta asserts, however, that the district court improperly admitted Williams's testimony that his father reported to him that an agreement had been reached concerning the municipal insurance business. Since the statement was offered to prove that Margiotta had engaged in a past act, the formation of an unlawful secret agreement, the state of mind exception of Fed.R.Evid. 803(3) was

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[26] Federal Rules of Evidence, Rule 803(3) provides, in pertinent part, that the following statements are "not excluded by the hearsay rule:"

(3) *Then existing mental, emotional, or physical condition.*

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

not available. Instead, Judge Sifton admitted this testimony on the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), which provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. We believe Judge Sifton did not commit error.

The law is well-settled that declarations that are otherwise hearsay may nonethless be provisionally admitted pursuant to Rule 801(d)(2)(E), subject of course to ultimate connection of the defendant with the conspiracy alleged in the indictment, if the trial court determines that the defendant and the declarant participated in the conspiracy, by a fair preponderance of the evidence independent of the hearsay utterances. *See, e.g., United States v. Cambindo-Valencia*, 609 F.2d 603, 630 (2d Cir. 1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2163, 64 L.Ed.2d 795 (1980); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970). In this case, sufficient evidence independent of the challenged hearsay statements established that a conspiracy existed, that it was in existence at the time the statement was made, that the declarations were made in furtherance of the conspiracy, and that both the elder Williams and Margiotta participated in the conspiracy. *See, e.g., United States v. Lyles*, 593 F.2d 182, 194 (2d Cir.), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 794 (1979); *United States v. Cafaro*, 455 F.2d 323, 326 (2d Cir.), *cert. denied sub nom., Schulman v. United States*, 406 U.S. 918, 92 S.Ct. 1769, 32 L.Ed.2d 117 (1972). This evidence includes Margiotta's own admissions concerning his approach by, and meeting with Richard B. Williams. Margiotta testified that during the meeting, Williams stated that he would "continue" the "system" carried on by Mortimer Weis, the Broker of Record for Hempstead at that time. Moreover, Margiotta testified that if the Williams Agency should ever have ceased distributing portions of its commissions, he would have convened a meeting of the Exec-

utive Committee of the Republican Party, and would have "probably" voted to replace Williams. Margiotta stated that he never told Ralph Caso, or other public officials, about the arrangement to share commissions on a "50-50 basis."

Furthermore, the non-hearsay evidence showed that as soon as the Williams Agency obtained the Town's insurance business following its designation as Broker of Record, the Agency, which had been sharing approximately ten percent of the commissions generated by placement of policies on properties owned by the Town of Oyster Bay, began setting aside fifty percent of the commissions earned. This evidence included ledger sheets dating from 1969 which contained a column labelled "50% of commissions," and a list of recipients sent by Margiotta's office to the Williams Agency designating amounts which totalled exactly 50% of the amount of the commissions shown on the ledger sheet as of the date of that list. The Williams Agency paid 50% of the commissions to the persons whose names appeared on the list. Indeed, ample evidence also supported a finding that Margiotta and Williams understood that their illicit arrangement should remain secret. In addition to Margiotta's admissions that he did not disclose the terms of the arrangement to Ralph Caso or other officials, the recipients of the kickbacks were ultimately directed to assist in the creation of falsified property inspection reports to make it appear they had performed work in exchange for the money they received. In the case of William Cahn, the parties to the agreement devised an arrangement of a legal retainer. Moreover, as noted above, numerous individuals associated with the municipal insurance scheme provided dissembling testimony to the State Investigation Commission. In short, the non-hearsay evidence was sufficient to show that a conspiracy existed, that it was in existence at the time the statement was made, and that both Williams and Margiotta participated in the agreement. Furthermore, since the parties to the agreement desired to

keep the terms of the pact secret, and Richard A. Williams would necessarily participate in the distribution of insurance commissions, the elder Williams's declaration to his son can reasonably be considered to have been made "in furtherance of" the conspiracy. *See United States v. Lyles, supra*, 593 F.2d at 194.

Margiotta claims that despite this evidence, the trial court erred in admitting the challenged hearsay statements because it did not explicitly make the findings articulated in *United States v. Geaney, supra*, and its progeny. This Court has never required a district court to use any talismanic words when admitting testimony under the co-conspirator exception to the hearsay rule. In *United States v. Cambindo-Valencia, supra*, 609 F.2d at 631, appellant Cambindo-Valencia argued that the trial judge failed to make an explicit finding of sufficient independent evidence. This Court rejected his claim as a ground of reversible error, noting that it was possible to "infer that the finding was made implicitly when the court admitted the statements over the defense's objections." *Id.* In light of Judge Sifton's familiarity with this evidence after the completion of the first trial, this inference seems especially warranted on the facts of this case. *See also United States v. Rosenstein*, 474 F.2d 705, 711-12 (2d Cir. 1973).

In any event, in explaining the admission of Richard A. Williams's hearsay account of his father's secret agreement, Judge Sifton observed that there was "a fairly substantial showing that at least as an initial matter there was a starting point of 50/50," and that there was "a sufficient basis" for inferring that there was "some agreed upon arrangement made in advance." Such language makes clear that Judge Sifton made the requisite *Geaney* findings, if not in *haec verba*. Finally, in stating that there was a sufficient basis to present Williams's testimony to the jury "for them to decide whether to accept" it or not, Judge Sifton was not permitting the jury

to decide whether the co-conspirator exception was available. Rather, he was merely noting that once the hearsay account was admitted, the jury could accept or reject the testimony. As a result, the district court did not violate the principle that determining the admissibility of challenged testimony is a function for the court, not the jury. *See United States v. Rosenstein, supra,* 474 F.2d at 712. For all these reasons, the district court did not err in admitting Richard A. Williams's hearsay account of his father's statements.

V. *Conclusion.*

Since our unraveling of the tangled skein of Margiotta's fraudulent artifice and analysis of his claims has taken us on a lengthy journey, we briefly set forth our conclusions. While the line between legitimate political patronage and fraud on the public has always been difficult to draw, we believe that the application of the mail fraud statute is permissible on the facts of this case. In the context of a mail fraud prosecution, we reject a per se rule precluding, as a matter of law, the finding of a fiduciary duty to the citizenry to render honest and faithful services on the part of individuals who technically hold no official public office yet participate substantially in the governance of communities. We hold that as an individual who was a de facto leader of government and who was relied upon by individuals in government for the administration of governmental affairs, Margiotta could properly be found to owe a fiduciary duty to the general citizenry of Hempstead and Nassau County, the breach of which duty could lay the predicate for a violation of the mail fraud statute. Moreover, the evidence was sufficient to support a finding that Margiotta assumed a fiduciary duty to disclose his secret agreement. Properly circumscribed as it was here, the indictment and prosecution of Margiotta for mail fraud did not violate his First Amendment rights of freedom of expression, association and petition, and we reject his claim that § 1341 is im-

permissibly vague on its face or as applied to the facts of the instant case. In addition, ample evidence supports the finding that Margiotta failed to disclose material information in violation of the mail fraud statute.

Addressing ourselves to the Hobbs Act convictions, we hold that Margiotta, having caused public officials to take actions which induced the consent of the Williams Agency to make the payments, could reasonably be found to have met the requirements of 18 U.S.C. § 2(b). As a result we conclude that the Government satisfied all the elements for convicting Margiotta of extortion "under color of official right." Moreover, the evidence was sufficient to support a verdict that the appellant had committed extortion through wrongful use of "fear." Finally, the trial court properly admitted Richard A. Williams's hearsay account of his father's statements concerning the secret agreement.

Accordingly, the judgment of conviction is affirmed in all respects.

RALPH K. WINTER, Circuit Judge (concurring in part and dissenting in part):

While I do not agree in every particular with the majority's analysis of the conviction rendered under the Hobbs Act, I concur in the result. Margiotta was not the instrument of a party organization executing well understood patronage practices but instead exercised personal discretion in each case as to the recipients of kickbacks, including payments to himself. This, I believe, is sufficient to characterize the entire kickback scheme as extortionate.

I dissent, however, as to the mail fraud count. The majority's use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes.

I

It should be emphasized at the outset that, while a kickback scheme [1] is relevant to Margiotta's conviction for mail fraud, it is not essential. Nor is the government required to prove any loss whatsoever to taxpayers or a violation of New York law. Reduced to essentials, the majority holds that a mail fraud conviction will be upheld when a politically active person is found by a jury to have assumed a duty to disclose material facts to the general citizenry and deliberately failed to do so. Mar-

[1] My use of "kickback scheme" includes what has been referred to as a "sale of office." While that phrase serves as useful window dressing for the majority, it is not clear whether they are referring to the post of Broker of Record or Republican County Chairman. Judge Sifton rules that the former is not a public officer under New York law, while the latter seems *a fortiori* a private position. It does not matter, however, since the crux of the majority's theory is non-disclosure of a material fact, *i.e.*, the excessive nature of the insurance commissions. Whether these offices are either "public" or "sold" is irrelevant under that theory.

giotta's conviction is based upon his failure as a partisan political leader with great influence to disclose to the citizens of the Town of Hempstead and Nassau County his knowledge that the Williams Agency would have been willing to act as Broker of Record for considerably smaller commissions than were actually paid. Because those citizens might have compelled the municipalities to reduce these costs had they been given this information, it is a material fact.

The kickback scheme is relevant to Margiotta's conviction because it proves (i) that the Williams Agency would have been willing to procure insurance for commissions considerably smaller than those actually paid and (ii)that Margiotta knew it. Had Margiotta secured Williams' appointment because of past political support knowing that the size of the commissions far exceeded the value of services to be performed, the fraud would have been as complete. Moreover, Judge Sifton charged, and the majority agrees, that the government need not prove that actual savings to taxpayers would have resulted from disclosure. Finally, although Margiotta is a local partisan political leader and the scheme involves municipal funds, no violation of state or local law[2] is necessary to support the federal mail fraud conviction since a jury is free to find a federal duty to disclose material facts.

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[2] The majority cites no New York authority establishing the duties they impose on political activists or public officials. They argue that Margiotta's ability to influence official action renders him subject to the same obligations under state law as are borne by the official having *de jure* power to take such action. Even assuming that state law would treat Margiotta as a public officer—an assumption not supported by New York authority—there is nothing to indicate that such officers have legal obligations under state law such as those imposed on Margiotta by the majority. The majority's assertions to the contrary are thus sheer *ipse dixit*. Since New York law is, as the majority itself notes, irrelevant to a federal mail fraud conviction, I fail to understand why they take such pains to make a patently inadequate argument.

The majority pays lip service to construing the criminal law against the government but then gives the mail fraud statute a more sweeping interpretation than any court which has addressed the statute to date. Given that this statute has occasioned a number of courts to comment apprehensively in the past about its steady expansion,[3] that is no mean feat.

The indictment itself demonstrates the scope of the theory underlying Margiotta's conviction. It charged him with defrauding the State, the Town of Hempstead and Nassau County and their citizens (i) "of the right to have [their] affairs . . . conducted honestly, impartially, free from bribery, corruption, fraud, dishonesty, bias,

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[3] *See, e.g., United States v. Rabbitt*, 583 F.2d 1014, 1024 (8th Cir. 1978) ("Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute."), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); *United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.) ("[T]he [mail fraud] statute should be carefully and strictly construed to avoid extension beyond the limits intended by Congress."), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978); *United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976) (Government attempt to prosecute "tipping" or payment of gratuities to official of a city agency "would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety . . . . The Government here is attempting to criminalize cupidity and we do not believe § 1341 can be extended to that extreme without a showing of additional facts which clearly bring the conduct within § 1341. Section 1341 is a penal statute with limitations as to its scope, which limitations were grossly exceeded in the present case."); *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir.) ("A narrow, careful construction is especially appropriate where, as here, the [mail fraud] statute threatens to reach criminal conduct in the field of domestic relations which the state can, and should, effectively and appropriately control."), *cert. denied*, 409 U.S. 891, 93 S.Ct. 118, 34 L.Ed.2d 148 (1972); *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied*, 397 U.S. 952, 90 S.Ct. 977, 25 L.Ed.2d 134 (1970).

and deceit" and (ii) "of the honest and faithful participation of [Margiotta] in [their] affairs." Given this sweeping charge and the majority opinion, no amount of rhetoric seeking to limit the holding to the facts of this case can conceal that there is no end to the common political practices which may now be swept within the ambit of mail fraud. Since the doctrine adopted by the majority applies to candidates as well as those holding office, *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974), a candidate who mails a brochure containing a promise which the candidate knows cannot be carried out is surely committing an even more direct mail fraud than what Margiotta did here. An elected official who for political purposes performs an act imposing unnecessary costs on taxpayers is guilty of mail fraud if disclosure is not made to the public. A partisan political leader who throws decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public. A partisan political leader who causes elected officials to fail to modernize government to retain jobs for the party faithful is guilty of mail fraud unless that fact is disclosed. In each of these cases the undisclosed fact is as "material" as the facts which Margiotta failed to disclose, the harm to the public is at least as substantial as the harm resulting from Margiotta's scheme, and the dishonesty, partiality, bias and deceit in failing to disclose those facts is equally present. This is not to say that Margiotta's conduct as a whole is not more odious than the conduct described in these hypotheticals. That is not the issue. The point is that the actions taken by Margiotta deemed relevant to mail fraud by the majority are present in each case: a relationship calling for disclosure, a material fact known to the candidate, official or party leader, and a failure to disclose it.

The majority is quite simply wrong in brushing aside the First Amendment issues. The theory they adopt subjects politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs. The majority explicitly bottoms Margiotta's mail fraud conviction on his failure to say something. Its logic would easily extend to the content of campaign literature. Indeed, it takes no great foresight to envision an indictment framed on the theory adopted by the majority and alleging mail fraud based on public speeches.

II

My brethren are not striking out on their own in pushing the mail fraud statute to limits far exceeding any Congressional intent.[4] To the contrary, much of

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[4] The legislative history of the mail fraud statute gives no indication that the statute was ever intended by Congress as an all-purpose weapon against political corruption. The current statute, 18 U.S.C. § 1341, had its origin in Section 301 of the Act of June 8, 1872, Ch. 335, § 301, 17 Stat. 323, and was part of a broad recodification of the postal laws and aimed at "prevent[ing] the frauds which are perpetrated by lottery swindlers through the mails," Report of the Postal Committee, March 30, 1870, 19-20. Congressman Farnsworth, sponsor of the legislation, stated that the mail fraud provisions were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country," Cong.Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). In 1889, Congress amended the mail fraud statute by adding specific prohibitions against a type of "counterfeit money fraud" called the "sawdust swindle" which dealt in "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," or "green cigars." Act of March 2, 1889, Ch. 393, § 1, 25 Stat. 873; *see* S.Rep.No. 2566, 50th Cong., 2d Sess. 2-4 (1889). In 1909, in the course of a general revision of the penal code, the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added to the statute as a clarification of the original phrase "any scheme or artifice to defraud." Act of March 4, 1909, Ch. 321, § 215, 35 Stat. 1130; *see*

what they say has substantial and direct precedent. For example, the statutory proscriptions are not limited to common law fraud or deceit but extend to dishonest schemes generally. *United States v. Barta*, 635 F.2d 999, 1005-06 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981). It also seems well established that dishonest actions by an employee which violate the employee's fiduciary obligations to an employer can be a basis for a mail fraud conviction. *United States* v. *George*, 477 F.2d 508, 512-14 (7th Cir.), *cert. denied*, 414 U.S. 827, 94 S.Ct. 49, 38 L.Ed.2d 61 (1973). Moreover, loss or concrete harm need not be shown beyond the fact that the employer was deprived of information which might have affected his or her judgment. *Barta, supra.*

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42 Cong.Rec. 1026 (1908) (remarks of Sen. Heyburn). In 1948, the statute was modified to delete "the obsolete argot of the underworld" added in 1889 and other language considered "surplusage," "without change of meaning" in the provision. H.R.Rep. No. 304, 80th Cong., 1st Sess. A100 (1948); Act of June 25, 1948, Ch. 645, § 1341, 62 Stat. 763. In 1949 the term "dispose of" was substituted for "dispose or," Act of May 24, 1949, Ch. 139, § 34, 63 Stat. 89, and in 1970 "Postal Service" was substituted for "Post Office Department," Postal Reorganization Act, Pub.L.No. 91-375, § 6(j)(11), 84 Stat. 719 (1970). None of these changes indicates any intent to fashion a statute with limitless parameters. Indeed, the addition of the "underworld argot" in 1889 arguably indicates that the original intent of the statute was not broad enough to cover even that most obvious of private frauds. Moreover, the addition to the statute of the phrase "false or fraudulent pretenses, representations, or promises" appears aimed at common law rulings which held false promises insufficient to gain a conviction for fraud. Indeed, it appears that Congress, in so modifying the legislation, was simply codifying the Supreme Court decision in *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896), which had previously rejected the common law rule. None of these changes indicates that the Congress considered mail fraud to be an appropriate statute for prosecuting political corruption and deception. Even if there were not a canon of construction calling upon us to avoid broad construction of criminal statutes, the recent extension of mail fraud by judicial fiat would be unwarranted.

One can, with seeming logic, move from those propositions to the proposition that a person holding governmental employment is bound by the same standards. *United States v. Bush*, 522 F.2d 641, 646-49 (7th Cir. 1975), *cert. denied*, 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976); *United States v. Brown*, 540 F.2d 364, 374 (8th Cir. 1976); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). From that it seems a small leap to apply these principles to those who hold elective as well as appointed office. *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974). We then arrive at a rule that elected officials have a duty to disclose material facts concerning their conduct of public affairs. Any official who fails to disclose such facts is guilty of mail fraud without regard to whether actual loss occurred or to whether local law was violated.

Much of what the majority says thus has direct precedential support. They add only one seemingly small element to these precedents: a jury may find that a politically active person has sufficient influence and power over the acts of elective officials to be subjected to the same duty as those officials so far as those acts are concerned. The failure of such a person to disclose material information to the public can thus constitute mail fraud.

However logical this growth of the law may seem, it leads to a result which is not only greater than, but is roughly the square of, the sum of the parts. The proposition that any person active in political affairs who fails to disclose a fact material to that participation to the public is guilty of mail fraud finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation. This wholly impermissible result is brought about, I believe, by drawing an

erroneous analogy between fiduciary relationships involving private parties based on express or implied contract and relationships between politically active persons and the general citizenry in a pluralistic, partisan, political system.

Mr. Justice Frankfurter quite appropriately underlined the fact that

> to say that a man is a fiduciary only begins an analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 85-86, 63 S.Ct. 454, 458, 87 L.Ed. 626 (1943). The words fiduciary duty are no more than a legal conclusion and the legal obligations actually imposed under that label vary greatly from relationship to relationship. Nevertheless, because fiduciary relationships in the private sector have been the subject of centuries of common law development, there is a considerable body of law based on implied or express contract governing whether particular behavior is legal. Its most notable feature, however, is the degree to which fiduciary obligations vary from relationship to relationship. Partners, employees, trustees and corporate directors are all fiduciaries, yet their legal obligations may be wholly dissimilar. While an hourly employee usually may quit a job without fearing legal action even though he leaves at a time which makes it difficult for the employer to continue business, a trustee may not so easily abandon his beneficiaries. While a trustee's actions are void or voidable if tainted by a conflict of interest, the corporate officer generally can act even if he is personally interested so long as the action is fair to the corporation.

To transfer this complex, variable body of law to the political context, simply by mouthing the word fiduciary,

makes the very mistake underlined by Mr. Justice Frankfurter in *Chenery*. Although the courts have, with precious little analysis, brought virtually all participants in government and politics under the rubric fiduciary, the obligations imposed are wholly the creation of recent interpretations of the mail fraud statute itself. A reading of the cases in this area, however, shows how little definition there is to these newly created obligations which carry criminal sanctions. For all one can find in the case law, no distinction is made between the fiduciary obligations of a civil servant, political appointee, elected official, candidate or partisan political leader. Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes. One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing." *Mandel*, 591 F.2d at 1361. The present case is no exception. While there is talk of a line between legitimate patronage and mail fraud, there is no description of its location. With all due respect to the majority, the quest for legal standards is not furthered by reference to "the right to good government" and the duty "to act in a disinterested manner."

Of course, we should all hope that public affairs are conducted honestly and on behalf of the entire citizenry. Nevertheless, we should recognize that a pluralistic political system assumes politically active persons will pursue power and self-interest. Participation in the political process is not limited to the pure of heart. Quite frankly, I shudder at the prospect of partisan political activists being indicted for failing to act "impartially" in influenc-

ing governmental acts.[5] Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions. Where Congress has not passed legislation specifying particular acts by the politically active as criminal, our reliance rather should be on public debate, a free press and an alert electorate. In a pluralistic system organized on partisan lines, it is dangerous to require persons exercising political influence to make the kind of disclosure required in public offerings by the securities laws.

III

My concerns in this case thus extend far beyond a disagreement over statutory interpretation. The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution. It may be a disagreeable fact but it is nevertheless a fact that political opponents not infrequently exchange charges of "corruption," "bias," "dishonesty," or deviation from "accepted standards of . . . fair play and right dealing." Every

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[5] Among the truths assumed by the founders was that self-interest would be a major generating force in democratic politics. The concern over "faction" motivated by "passion . . . adverse . . . to the interests of the community" appears again and again in The Federalist Papers. *The Federalist* No. 10, at 54 (J. Madison) (Modern Lib. ed. 1937); *see also, e.g., id.* No. 9 (A. Hamilton); *id* No. 14, at 79-80 (J. Madison); *id.* No. 37, at 225, 228, 232 (J. Madison). The founders suffered under no illusion that only "enlightened statesmen" would hold the reins of power. *Id.* No. 10, at 57 (J. Madison). They sought safety in checks and balances and a separation of powers which would prevent the assertion of too much power in a single hand. *See id.* No. 47 (J. Madison); *id.* No. 48 (J. Madison); *id.* No. 49 (J. Madison or A. Hamilton); *id.* No. 50 (J. Madison or A. Hamilton); *id.* No. 51 (J. Madison or A. Hamilton). The majority decision vests federal prosecutors with largely unchecked power to harass political opponents. It may be that we should expect only "enlightened statesmen" to hold such office, but, with Madison, I would prefer not to take such a risk.

such accusation is now potentially translatable into a federal indictment. I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors.

Margiotta's crimes were carried out in the name of Nassau County Executive Ralph Caso. Without his authority, the mail fraud described here could not have been committed. Caso testified that he was controlled by Margiotta and did not know that the Williams Agency would have procured insurance for smaller commissions or that there was a kickback scheme involved. Even if he lacked that specific knowledge, however, surely he did not think that Margiotta's interest in naming the Broker of Record stemmed from intellectual curiosity about the application of actuarial principles. And surely the fact Caso appointed the Williams Agency solely at the behest of Margiotta and without regard to cost of insurance was a material fact which should have been disclosed by Caso, the County Executive, to the citizens of Nassau County. Yet Caso was not indicted.

Even as to the partisan distribution of insurance commissions, the government concedes that Margiotta's conduct, so far as relevant to mail fraud, was hardly unique; in fact, it was a statewide practice. For example, Margiotta's Democratic counterpart in Long Island diverted commissions to brokers recommended by him when he was in power. One presumes he made no public announcement that he was doing so even though the practice imposed unnecessary costs on taxpayers. And the government brief states, as to insurance purchased by the State, "New York State employees performed all the work that a broker of record would perform; when policies were awarded, a politically designated broker was named the broker for

each particular policy and received the commission." While the government seeks to distinguish this scheme by saying there was no sale of office—a point irrelevant to the theory of the mail fraud count [6]—the New York State scheme was, if anything, more harmful so far as the taxpayers were concerned. In Nassau County, the Williams Agency did perform some services in return for the commissions. The state practice was to pay state employees to do the work and distribute the commissions to brokers who did nothing at all. Notwithstanding the statewide existence of what in the majority's view was mail fraud, only Margiotta was indicted.

In arguing this case, the United States Attorney left no doubt that he prosecuted Margiotta for political corruption generally.[7] The problem is that in stretching the mail fraud statute to fit this case, we create a crime which applies equally to persons who have not done the evil things Margiotta is said to have done, a catch-all political crime which has no use but misuse. After all, the only need served by resort to mail fraud in these cases is when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct. But that use creates a danger of corruption to the democratic system greater than anything Maragiotta is alleged to have done. It not only creates a political crime where Congress has not acted but also lodges unbridled power in federal prosecutors to prosecute political activists. When the first corrupt prosecutor prosecutes a political enemy for mail fraud, the rhetoric of the majority about good government will ring hollow indeed.

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[6] *See* note 1, *supra*.

[7] During oral argument, there were comparisons to "Leonid Brezhnev" and "systems that are alien to our country," statements such as "in Mineola, not Moscow," and a reference to "a former District Attorney who was supposed to be enforcing the law gets convicted, he's paid off $2,000 a month to make sure that the skeletons stay in the closet."

APPENDIX B

UNITED STATES COURT OR APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of November, one thousand nine hundred and eighty-two.

No. 82-1025

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH M. MARGIOTTA,
Defendant-Appellant.

[Filed Nov. 5, 1982]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by counsel for the defendant-appellant, Joseph M. Margiotta,

Upon consideration by the panel that heard the appeal, it is

ORDERED that the said petition for rehearing is DENIED, Judge Winter dissenting.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for

rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

Judges Oakes, Meskill, Newman, and Winter dissent from the denial of rehearing in banc, believing that the extension of the mail fraud statute, 18 U.S.C. section 1341 (1976), reflected in the panel decision, warrants in banc consideration of the fundamental and recurring issue whether the statute applies to schemes to defraud members of the public of intangible rights, such as a right to the faithful performance of duty by a public official or a political leader exercising equivalent authority. *See* Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562 (1980).

Judge Pratt took no part in the consideration or decision of this case.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX C

MAIL FRAUD STATUTE

18 U.S.C.§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX D

HOBBS ACT

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other

commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

APPENDIX E

PRINCIPALS

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

No. 82-1126

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. MARGIOTTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a political party leader who is found to be a de facto public official may be held to the same standards as public officials for purposes of the mail fraud statute, 18 U.S.C. 1341.

2. Whether the evidence was sufficient to support petitioner's convictions under the Hobbs Act, 18 U.S.C. 1951, on the theory that, while not a public official himself, he caused public officials to induce extortionate payments "under color of official right."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 688 F.2d 108.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1982. A petition for rehearing was denied on November 5, 1982. The petition for a writ of certiorari was filed on January 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and five counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to concurrent prison

terms of two years on each count. The court of appeals affirmed (Pet. App. 1a-71a).

1. The evidence adduced at trial is recounted in detail in the opinion of the court of appeals (Pet. App. 5a-19a). It showed that petitioner was the Chairman of the Republican Committee of both Nassau County and the Town of Hempstead, New York (*id.* at 5a). Although he held no Town or County office, he became deeply involved in affairs of government and exercised a "vise-like grip" over the basic governmental functions in these jurisdictions (*id.* at 12a). In particular, petitioner dominated the governmental administration of insurance affairs (*id.* at 12a-13a). Through his "control" of the Presiding Supervisor of Hempstead and the Nassau County Executive, he was able to select the Broker of Record for those jurisdictions, who had authority for obtaining insurance on municipal properties (*id.* at 6a-7a, 12a). And when insurance brokers sought government business, they undertook discussions with petitioner, not with public officials (*id.* at 13a). If petitioner declined their offers, they did not even appeal to the public officials because "there was no place else to go" (*ibid.*).

Petitioner also played a substantial role in making governmental hiring and promotion decisions (Pet. App. 14a-15a). Through his control of the program staffing officer for Nassau County, petitioner would see to it that County jobs went to persons who had actively supported the local Republican Party (*id.* at 14a). Petitioner himself would interview individuals applying for high level County positions (*ibid.*). He would also personally approve or disapprove promotions and salary increases based upon the individuals' political activity and financial contributions to the Republican Party (*ibid.*). Petitioner played substantially the same role in the government of the Town of Hempstead (*id.* at 15a).

In 1968, petitioner struck a deal with insurance broker Richard B. Williams according to which Williams' insurance agency would be named Broker of Record for the Town of Hempstead and, in return for the appointment, the Agency would set aside 50% of the insurance commissions it received, to be distributed as specified by petitioner (Pet. App. 16a). The Williams Agency was subsequently appointed as Hempstead's Broker of Record pursuant to the agreement (*id.* at 6a-7a). In 1971, the Williams Agency was appointed, under the same arrangement, as Broker of Record for Nassau County (*id.* at 6a-7a, 16a). Among the recipients of the kickbacks paid by the Williams Agency were numerous insurance brokers who performed no legitimate work, lawyers, and other friends of petitioner, including a convicted former Nassau County District Attorney and a former State Supreme Court Justice who was ultimately disbarred (*id.* at 7a, 16a-17a).[1]

Indeed, petitioner himself also benefitted from the kickback arrangement. On one occasion after advising one Robert Dowler that Dowler was to receive $10,000, petitioner obtained Dowler's agreement to pay him one half of

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[1]During the period at issue, the Williams Agency received more than $2.2 million in commissions and other compensation (Pet. App. 7a), and hundreds of thousands of dollars in kickbacks were distributed by petitioner as "the spirit moved [him]" (Tr. 2980-2981). The largest recipient of money paid by the Williams Agency (approximately $118,000) was William Cahn, a former Nassau County District Attorney who was convicted of mail fraud. Cahn received $2000 a month from the day he left office (January 1, 1975) until April 1, 1977, when he went to jail. At petitioner's direction, and despite objections by the Williams Agency (Tr. 975-976, 981-982), $2000 a month was then paid to Cahn's son until January 1980 (Tr. 982). Another recipient, a New York State Assemblyman, received approximately $50,000 in 1979 and 1980 (Tr. 2907). Petitioner apparently overlooks these payments in stating (Pet. 6) that the kickbacks exacted from the Williams Agency ceased in 1978.

that amount (Tr. 1674-1675). After receiving the $10,000 from Williams, Dowler gave petitioner a check for $5,000, which petitioner used to pay his delinquent Nassau County property taxes (Tr. 2986).

The concealment of the kickback scheme was achieved through the preparation of fictitious property inspection reports that gave the appearance that the recipients of the kickbacks were legitimately earning commissions (Pet. App. 18a). In addition, petitioner and several other recipients of the kickbacks gave false and misleading testimony to a State Investigation Commission when it inquired into the scheme in 1977 and 1978 (*ibid.*).

2. The principal factual defense at trial—reiterated in the petition—was that petitioner was simply following a long-established patronage practice of having the Broker of Record split his commissions with other brokers who did no work. This claim underlay petitioner's motion to dismiss on grounds of selective prosecution, which the district court summarily denied. It found (Jan. 21, 1982 Tr. 21-22):

> [There is] no evidence in this record that anyone else obtained a patronage fund of insurance by the sale of public office, or that anyone else engaged in extortion. And the fact that others engaged in such plainly criminal conduct would be a poor defense to its repetition.

The jury too rejected petitioner's defense of good faith, after being thoroughly instructed in unexceptionable language (Tr. 3578-3583).

3. The court of appeals affirmed the conviction on all counts. With regard to the mail fraud count the court stated that Section 1341's disjunctive wording establishes that it is not limited to schemes to obtain money or property, and accordingly concluded that it covers breaches of fiduciary duty, including depriving citizens of their right to the

honest and loyal services of government officials (Pet. App. 22a-23a). By the same token, the court held, one who did not hold public office could be covered by the statute provided he in fact controlled the governmental decision-making process, and "others rel[ied] upon him because of a special relationship in the government" (*id.* at 24a). In this case, the court found, the trial judge instructed the jury to that effect, and "[t]he evidence established not only that [petitioner] was responsible for the administration of the municipal insurance activities, but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases" (*id.* at 25a; see also *id.* at 33a). In the exercise of that authority, petitioner had engaged in a "secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies" (*id.* at 35a). The court also rejected First Amendment concerns raised by petitioner, concluding that its narrow construction of the statute to reach egregious conduct like petitioner's would not chill protected political activity (*id.* at 38a-39a).

With regard to the Hobbs Act counts, the court unanimously held that petitioner, though not a public official, was guilty of extortion "under color of official right" (18 U.S.C. 1951(b)(2)) pursuant to 18 U.S.C. 2(b), since he had "willfully cause[d] an act to be done which if directly performed by him or another would be an offense against the United States" (Pet. App. 43a). In this case petitioner had caused public officials to commit the acts necessary for inducing the Williams Agency to make kickback payments (*id.* at 45a).

Judge Winter concurred in upholding the Hobbs Act convictions, finding that petitioner "was not the instrument of a party organization executing well understood patronage practices," and that "the entire kickback scheme [was]

extortionate" (Pet. App. 60a). With regard to the mail fraud count, he found "substantial and direct precedent" for "much of what" the majority said on that issue (*id.* at 64a-65a), but would have held that one not holding public office could not be subjected to whatever fiduciary standards governed the conduct of public officials (*id.* at 66a).

In response to petitioner's suggestion of rehearing en banc, three other judges joined Judge Winter in voting for rehearing, but only with respect to the affirmance of the mail fraud conviction (Pet. App. 72a-73a). In doing so, those who were not on the panel did not indicate disagreement with the panel's conclusion, but only their belief that "the fundamental and recurring issue" of applying mail fraud to intangible rights warranted en banc consideration (*id.* at 73a).

ARGUMENT

The decision below is correct, is supported by substantial precedent, and conflicts with no decision of this Court or of any other court of appeals. Review by this Court is unwarranted.

1. Petitioner devotes the bulk of his petition to the argument that the court of appeals erred in affirming his conviction for mail fraud. The court of appeals held that "individuals who in reality or effect are the government owe a fiduciary duty to the citizenry" regardless of whether they hold a de jure public office (Pet. App. 29a), and that a secret agreement by such an individual to use his influence to secure a public favor for another in return for kickbacks defrauds the public of its right to his honest and faithful participation in the affairs of government. As Judge Winter acknowledged in dissent, there is "substantial and direct precedent" for the court's holding, which in any event was carefully "limit[ed] * * * to the facts of this case" (*id.* at 63a, 65a).

a. Petitioner's first argument illustrates the truth of Judge Friendly's observation that "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling * * *." *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974). Parroting the predictions in Judge Winter's dissent, and ignoring the explicit limitations in the court's opinion, petitioner suggests that review is required because the court of appeals had held " 'that a mail fraud conviction will be upheld when a politically active person is found by a jury to have assumed a duty to disclose material facts to the general citizenry' "(Pet. 11, quoting Pet. App. 60a). There will be, petitioner threatens, " 'no end to the common political practices which may now be swept within the ambit of mail fraud' " (*id.* at 11a, quoting Pet. App. 63a). Indeed, "[e]very political leader, candidate, lobbyist, and interest group—even an influential religious leader or newspaper editor—may be exposed to criminal sanction based on involvement in 'governmental affairs' " (Pet. 11).

Responding to these forebodings, the court of appeals noted that petitioner had simply "overlook[ed] our narrow construction of the mail fraud statute. The necessity of meeting our restricted tests for the existence of a duty as a government fiduciary on the part of those who technically hold no public office precludes the use of § 1341 for dragnet prosecutions of party officials" (Pet. App. 39a). Petitioner was not, the court pointed out, simply "a politically active person." On the contrary, he

> had a stranglehold on the respective governments of Nassau County and the Town of Hempstead. According to * * * one of Margiotta's principal assistants, "everything went through his hands." The evidence established not only that he was responsible for the administration of the municipal insurance activities,

> but also that he acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases. Others relied upon him for the rendering of important governmental decisions, and he dominated governmental affairs as the de facto public leader. As a result, the federal mail fraud statute properly supported a prosecution for Margiotta's breach of at least a minimum duty not to sell his substantial influence and control over governmental processes.

(*Id.* at 25a-26a.) Moreover, the court stressed that petitioner's violation of the mail fraud statute was not simply a case of a "politically active person" ignoring his duty to disclose material facts (*id.* at 35a):

> The breach of fiduciary duty on which his mail fraud prosecution has been predicated is not his failure to make decisions on the basis of merit, or on any misrepresentation or omission concerning his partiality. Rather, the crux of Margiotta's impropriety is the secret scheme, pursuant to which his recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation to Margiotta's political allies. Ample evidence, including the testimony of Richard A. Williams and Margiotta himself, supports the Government's contention that this secret deal was struck and followed over the course of several years.

In short, three critical elements were necessary to sustain petitioner's mail fraud conviction: first, a relationship with Nassau County and the Town of Hempstead which made petitioner "a de facto leader of government * * * who was relied upon by individuals in government for the administration of governmental affairs" (Pet. App. 58a); second,

"the secret scheme, pursuant to which [petitioner's] recommendation of the Williams Agency was made on the understanding that the Agency would kick back a portion of its compensation" (*id.* at 35a); and third, the failure to disclose this scheme "to those in the government who relied upon him" (*id.* at 37a).

Accordingly, it is plain that rather than opening a Pandora's box, the majority opinion simply stands for the unremarkable proposition that any individual who takes effective control of the process of city or county government owes the same standard of fidelity as one who is formally elected or appointed to public office. Petitions for certiorari have been consistently denied in numerous cases in which public officials have been found guilty of defrauding the public of its right to honest and faithful participation in the affairs of government by making corrupt agreements of the kind at issue here. *E.g., United States* v. *Mandel*, 591 F.2d 1347, 1358-1364 (4th Cir.), aff'd en banc, 602 F.2d 653 (1979), cert. denied, 445 U.S. 961 (1980); *United States* v. *Keane*, 522 F.2d 534 (7th Cir. 1975), cert. denied 424 U.S. 976 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 763-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974). The unique nature of petitioner's role in the affairs of government, which the jury found here, makes this case little different from those cases. Cf. *United States* v. *Del Toro*, 513 F.2d 656, 663 & n.4 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

b. The foregoing analysis also sufficiently disposes of petitioner's claim that the court of appeals' decision is "[u]nprecedented and [u]nsupported" (Pet. 13). There is, as we have observed and as the dissenting opinion acknowledged, ample precedent for the holding of the court of appeals. Indeed, petitioner's argument rests not on the

absence of precedent, but on the premise that all the mail fraud cases applying Section 1341 to schemes to defraud of intangible rights were wrongly decided. This Court has repeatedly declined to review cases rejecting that argument. *United States* v. *Mandel, supra*; *United States* v. *Keane, supra*; *United States* v. *States, supra*; *United States* v. *Isaacs, supra*; *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941); *United States* v. *Buckner*, 108 F.2d 921 (2d Cir.), cert. denied, 309 U.S. 669 (1940); *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bronston*, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982). See also *United States* v. *Brown*, 540 F.2d 364, 374 (8th Cir. 1976).

c. Petitioner next argues (Pet. 15-16) that the court of appeals erred in supposing "that the federal mail fraud statute creates *federal* fiduciary duties." We need not tarry long over this contention. In an alternative holding incorrectly characterized by petitioner as dictum, the court of appeals found that it was unnecessary to reconcile petitioner's "principles of federalism with the mandate of the mail fraud statute because Margiotta owed a fiduciary duty to the citizenry of Hempstead and Nassau County under New York law" (Pet. App. 29a). Petitioner claims that the detailed analysis of New York law undertaken by the court of appeals is erroneous (Pet. 15-16 n.5). While we disagree with petitioner in this, it is hardly necessary to grant certiorari to review the propriety of the majority's analysis of New York law.

It is in any event well settled that a violation of local law is not an element of a mail fraud offense. See, *e.g.*, *United States* v. *Von Barta, supra*, 635 F.2d at 1007; *United States* v. *Mandel, supra*, 591 F.2d at 1362; *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975); *United States* v. *States, supra*, 488 F.2d at 764; *United States* v. *Edwards*,

458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972). The purpose of the mail fraud statute is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of the exact nature of the scheme or of whether or not the scheme happens to be forbidden by state law. See *Parr* v. *United States*, 363 U.S. 370, 389, 390 (1960). Mail fraud is in this respect materially different from offenses such as that descibed in the Travel Act (18 U.S.C. 1952), which derive from Congress's power under the Commerce Clause, are meant to supplement state law enforcement, and are keyed to the presence of independently unlawful activity.[2]

d. Petitioner next argues that the court of appeals' decision "directly impinges upon the First Amendment" (Pet. 16). But it is plain that petitioner is not alleging that *his* prosecution for mail fraud violated the First Amendment. Petitioner does not suggest that a party leader may not be punished for entering into a corrupt agreement to procure a public position for another in return for kickbacks, or that the use of the mails in furtherance of such a scheme may not

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[2]Petitioner's reliance on *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), is misplaced. The Court there held that the use of the term "fraud" in Rule 10b-5 (17 C.F.R. 240.10b-5) did not extend to "all breaches of fiduciary duty in connection with a securities transaction" (430 U.S. at 472). The reason was that the statute itself (15 U.S.C. 78j(b)) spoke not of "fraud" but of "manipulation" and "deception," and its less expansive language controlled the interpretation of the Rule. 430 U.S. at 472-473. Here, by contrast, the mail fraud statute itself expressly applies to "any scheme or artifice to defraud" (18 U.S.C. 1341). Petitioner's conduct, by virtue of his control of the local government, was clearly a fraud on the citizenry of Hempstead and Nassau County. As this Court stated long ago in *Badders* v. *United States*, 240 U.S. 391, 393 (1916), "Congress may * * * forbid any such act done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not," since "[t]he overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate."

be punished. As the court of appeals correctly observed (Pet. App. 38a-39a): "Since the conduct charged in the Indictment was within the power of the United States Government to proscribe and there is no indication that the application of the mail fraud statute in this specific case would deter protected political activities in other contexts, the prosecution of [petitioner] under Count One did not violate the First Amendment. *See Broadrick* v. *Oklahoma*, * * * 413 U.S. [601,] 615 [1973]."

Petitioner's argument is, again, ultimately nothing more than a series of "Cassandra-like predictions" about the consequences the court's decision may have in other contexts. According to petitioner, the court held that a party chairman must act as a " 'disinterested' fiduciary for the whole electorate, including political opponents" (Pet. 16). And according to the dissenting opinion, the court subjected "politically active persons to criminal sanctions based solely upon what they say or do not say in their discussions of public affairs" (Pet. App. 64a). Both claims simply ignore the carefully limited holding of the panel majority, which properly noted (*id.* at 38a):

> The First Amendment concerns raised by [petitioner] * * * are a chimera. Count One of the indictment and the pertinent jury instructions do not address mere participation in the political process or protected conduct such as lobbying or party association. Rather than resting on a generalized breach of duty to render disinterested services on the part of one who participates in the political process in some unspecified way, the indictment and prosecution focused on whether [petitoner's] corrupt agreement breached a fiduciary duty which [he] owed as a result of his significant role in the governance of Hempstead and Nassau County.

e. Petitioner's final argument regarding his mail fraud conviction is that he was deprived of fair notice that his conduct was wrongful. This contention is frivolous.

Petitioner, who was a lawyer, himself acknowledged at trial that his corrupt agreement with the Williams Agency could be illegal (Pet. App. 40a). Section 1341 has for decades been applied to undisclosed agreements that constitute a breach of fiduciary duty (*United States* v. *Buckner, supra*; *Shushan* v. *United States, supra*), and the court of appeals explicitly found that petitioner had breached a fiduciary duty he owed under New York law. Moreover, this Court over a century ago described agreements for the sale of public office to be "inconsistent with sound morals and public policy." *Tool Company* v. *Norris*, 69 U.S. (2 Wall.) 45, 55 (1865). The New York Court of Appeals has long taken a similar position, explaining that "public service will rapidly degenerate and become corrupt if appointments to office are dictated by money offered or paid instead of that merit and capacity which should alone be regarded." *Deyoe* v. *Woodworth*, 144 N.Y. 448, 450 (1895). The purchase and sale of public office or place is accordingly proscribed by the penal laws of New York and the United States, without regard to whether the recipient of the payment is a public official. N.Y. Elec. Law § 17-158(3) (McKinney 1978); N.Y. Penal Law § 200.50 (McKinney 1975); 18 U.S.C. 210. Although the court of appeals in this case declined to overturn the trial court's ruling that those statutes were technically inapplicable, it noted that at the very least they "provide analogous authority for a finding of fiduciary duty" (Pet. App. 32a n.20). Under these circumstances, and given a jury instruction requiring a finding that petitioner acted knowingly and willfully in a fraudulent manner, and with bad faith (Tr. 3578-3583), petitioner's suggestion that he had no fair warning that he was breaching a fiduciary duty is completely devoid of merit.

Once more petitioner's contention is nothing more than an oracular prediction that the court of appeals' holding "opens the door to arbitrary, capricious and discriminatory use of the federal mail fraud statute" (Pet. 18). That misuse, he suggests, is "illustrated dramatically in the present case where only Petitioner was prosecuted for a patronage practice that had existed for more than fifty years and involved thousands of persons" (*ibid.*). A sufficient answer to this contention is the fact that the trial court rejected petitioner's claim of selective prosecution, and the jury rejected petitioner's "good-faith" defense based on his reliance on alleged similar prior practices by others. Even Judge Winter's partial dissent acknowledged that petitioner "was not the instrument of a party organization executing well understood patronage practices" (Pet. App. 60a).[3] At issue in this case is not some generic practice of commission sharing, but a course of conduct that the court of appeals unanimously agreed was corrupt and extortionate. While

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[3]It unnecessary to belabor the point with a detailed discussion of the distinctions between petitioner's conduct and other fee-splitting practices. We simply observe that while the sharing of insurance commissions with nonworking brokers may have been a widespread practice, the manner in which it was practiced was different in various places, and it was those differences that dictated whether criminal prosecutions were brought. In no other case was it marked, as it was here, by payoffs to attorneys, judges, and party officials who were not licensed insurance brokers—a practice never sanctioned by the New York Insurance Department (Tr. 1214-1215, 1224). Here, moreover, the kickbacks were a payoff for the sale of the position of Broker of Record, and were concealed by the preparation of fictitious property inspection reports and false testimony to a State Investigation Commission. As the New York State Investigation Commission observed: "The SIC is aware that criminal indictments have been returned in certain situations involving misapplied insurance commissions. In other situations involving misapplied insurance commissions, the evidentiary distinctions have been such as to frustrate prosecution for criminal wrongdoing under existing statutes." *1978 Annual Report of the Temporary Commission of Investigation of the State of New York to the Governor and the Legislature of the State of New York* 165-166 (1979).

the dissent raised questions about the implications of the court's mail fraud holding, it is plain that those concerns are unwarranted in the context of the instant prosecution.

f. Petitioner was sentenced for his mail fraud conviction to a two-year term, to run concurrently with the two-year terms imposed for each of his five Hobbs Act convictions. Thus, regardless of the validity of petitioner's conviction on this count, he still would serve the same sentence if his Hobbs Act convictions were upheld. If the Court should decide, as we next show, that petitioner's Hobbs Act claim is unworthy of review, this would be an appropriate occasion, as an exercise of discretion under the concurrent sentence doctrine, to decline to review the issues raised by petitioner with regard to his mail fraud conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969). The alternative would be to render an essentially advisory opinion respecting petitioner's hypothetical suppositions about possible future abuses of the mail fraud statute.

2. Petitioner also challenges the court of appeals' unanimous holding that, in Judge Winter's words, "the entire kickback scheme [was] extortionate" (Pet. App. 60a). In particular petitioner, who was convicted of inducing the Williams Agency to make kickback payments "under color of official right" and by wrongful use of fear, argues that it could not, as a matter of law, be established that the consent of the Williams Agency was induced "under color of official right" (Pet. 20-24).[4]

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[4]Petitioner "challenges" in a footnote (Pet. 24 n.9), without supporting argument, his conviction for extortion through wrongful use of fear. He also claims (Pet. 24), without particularization, that his Hobbs Act convictions should be reversed "because the inclusion of the improper mail fraud count allowed the prosecution to introduce otherwise irrelevant evidence concerning Petitioner's partisan patronage activities." But all of the evidence introduced on the mail fraud count was relevant

The district court ruled that petitioner could not be convicted as a principal acting "under color of official right" (18 U.S.C. 1951(b)(2)). Instead it directed the jury, pursuant to 18 U.S.C. 2(b), that it could convict only if it found that petitioner "caused officials of the Town of Hempstead and Nassau County under color of office to contribute in a substantial way to inducing the Williams Agency to consent to pay out the monies referred to in Counts Two through Six" (Tr. 3591). The jury was also instructed that, in determining whether the action of public officials contributed in a substantial way to bringing about the payments, it should consider "whether or not the payments alleged were, in fact, induced by the conduct of the public official in his official capacity and not solely by conduct of the defendant" (*ibid.*).[5]

This charge correctly articulated the standard required by 18 U.S.C. 2(b), which permits conviction of one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States * * *." As the court of appeals held (Pet. App. 44a-45a):

> One of the indispensable elements in the extortion kickbacks from the Williams Agency was the official act of Ralph Caso and other public officials of Nassau

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to the Hobbs Act counts, because it concerned the issues of petitioner's power over the local governments and the reasonableness of the victims' fear of economic loss if they did not make the payments demanded of them. Indeed, the question of relevance is so clear that petitioner did not raise this argument in the court of appeals.

[5]See *United States* v. *Furey*, 491 F.Supp. 1048, 1067 (E.D. Pa.), aff'd, 636 F.2d 1211 (3d Cir. 1980), cert. denied, 451 U.S. 913 (1981) (defendant could be convicted of extortion under color of official right "even though he was no longer tax assessor" if he assured the victim that he could "cause" the present tax assessor "to make a lower tax assessment").

> County and the Town of Hempstead in appointing and retaining the Williams Agency as Broker of Record. Had that conduct, which the jury could reasonably find from the evidence was caused by Margiotta, never occurred, the Williams Agency would not have been in a position to make the challenged payments. If the public officials were aware that the Agency was making the kickbacks at the direction of Margiotta as a result of their exercise of official power in designating and retaining the Agency as Broker, the public officials could have been found guilty of extortion as principals, for unlawfully obtaining the consent to the payments under color of official right.

Although in this case the public officials were unaware that petitioner had manipulated them to extort kickbacks, petitioner

> who caused them to act in this way is viewed as having "adopt[ed] not only [their] act but [their] capacity" as well. * * * Since Margiotta could reasonably be found to have caused a public official to commit the act necessary for inducing the Agency's consent to make the kickback payments, he could be convicted of extortion pursuant to the provisions of 18 U.S.C. § 2(b), even though the public official may have been a mere innocent intermediary * * *.

(Pet. App. 45a.) Petitioner challenges the propriety of this holding in three ways. Each is without merit.

a. Petitioner first claims that no public official received or personally transferred to third parties any payment not due him or his office (Pet. 21). But the law is clear that neither direct receipt nor personal transference to third parties is required to sustain a Hobbs Act conviction. *United States* v. *Green*, 350 U.S. 415, 420 (1956); *United States* v. *Trotta*, 525 F.2d 1096, 1098 n.2 (2d Cir. 1975), cert.

denied, 425 U.S. 971 (1976); *United States* v. *Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Indeed such a requirement would make no sense as a matter of law or policy. See *United States* v. *Shirey*, 359 U.S. 255, 261-262 (1959).

b. Petitioner also claims (Pet. 22) that no public official "misused his office to induce payments." But petitioner's liability under Section 2(b) derives from the fact that he caused a public official to use the powers of his office to induce payments from the Williams Agency. This was a misuse of public office even though the incumbent was unaware of petitioner's acts. See, *e.g.*, *United States* v. *Wiseman*, 445 F.2d 792, 795 (2d Cir.), cert. denied, 404 U.S. 967 (1971). Moreover, because it is the exercise of the power of public office to obtain money (without any threats or acts of inducement) that constitutes extortion under color of official right, the fact that the public official himself did not demand payments or make any overt threats is immaterial.[6]

c. Petitioner also argues (Pet. 22-23) that the indictment did not charge, and the jury was not required to find, that the motivation of the Williams Agency focused on the "recipient's office"—*i.e.* the office of the officials who had the power to appoint and dismiss the Agency as Broker of Record.[7] This claim is insubstantial. The indictment specifically alleged that the Williams Agency consented to make the payments because of its reasonably held belief (i) that

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[6]Though the pressure of force, fear, or simple solicitation may render a public official guilty of obtaining money under color of official right, no such affirmative acts are essential if the payments are motivated by the power of public office to help or harm the victim. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 594-595 (3d Cir. 1982), cert. denied, No. 81-1899 (June 7, 1982); *United States* v. *Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981); *United States* v. *Butler*, 618 F.2d 411, 417 (6th Cir.), cert. denied, 447 U.S. 927 (1980).

[7]As noted above (pages 17-18), the public official whose powers are used to induce the extortionate payments need not be the "recipient."

the public officials of Nassau County and the Town of Hempstead "would appoint or dismiss, as Broker of Record * * * any person whom the [petitioner] * * * told them to appoint or dismiss," and (ii) that if it did not make the payments, it would not be appointed or continued as Broker of Record (Superseding Indictment 12, 13, 15, 16, 18). Moreover, the district court expressly instructed the jury that it should consider "whether or not the payments alleged were, in fact, induced by the conduct of the public official in his official capacity and not solely by conduct of the [petitioner]" (Tr. 3591).

Petitioner's suggestion (Pet. 22-23) that the evidence was insufficient to show such motivation on the part of the Williams Agency is mistaken and in any event does not warrant review. The evidence established that petitioner caused public officials in Hempstead and Nassau County to appoint and retain the Williams Agency as Broker of Record (Pet. App. 12a, 13a). Petitioner himself testified that if the Agency stopped making payments in accordance with his directions, he would have convened a meeting of the Executive Committee of the Republican Party to recommend Williams's replacement as Broker of Record (*id.* at 13a, 49a). Williams's own testimony demonstrated his identical understanding of his obligations (*id.* at 48a-49a). As the court of appeals noted (*id.* at 47a), "It is reasonable to conclude that the Williams Agency consented substantially for the reason that the positions held by the public officials, who were controlled by Margiotta, gave the officials the power to choose another as Broker of Record if the Agency did not consent to the payments."[8]

United States v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975), cited by petitioner (Pet. 22), is simply a case where the public official was the recipient.

[8]Petitioner's suggestion (Pet. 22-23) that Williams, Jr. paid kickbacks because he felt "obligated [to do so] under contract law" is difficult to credit. As the court of appeals expressly found (Pet. App. 51a), "the jury

d. Petitioner concludes by suggesting that he "was held to have committed extortion 'under color of official right' simply because he possessed influence over public officials" (Pet. 23). He urges that the court of appeals' affirmance of his conviction "criminalizes a whole range of conduct that has traditionally been regarded as legitimate lobbying and political activity" (Pet. 24). But petitioner was not convicted of "possess[ing] influence." He was convicted of using his influence to extract kickbacks for himself and his associates in a manner that has long been regarded as illegal.[9] As the Fifth Circuit recently observed in rejecting a similar argument,

> Since [the defendant's] conduct "falls squarely within the 'hard core' of the statute's proscriptions" * * * we adopt the solution of Justice Holmes in *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930): "[I]f there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns."

United States v. *Dozier*, 672 F.2d 531, 540 (5th Cir. 1982), cert. denied, No. 82-60 (Oct. 18, 1982).

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could reasonably infer that Williams did not believe he was carrying out a 'valid contract' from the evidence of Williams's participation in the creation of fictitious property inspection reports, his dissembling testimony before the New York State Investigation Commission, and the decision to reduce the portions of the commissions distributed from the agreed upon fifty percent."

[9]See *supra* page 13. Cf. the New York Lobbying Act, 1981 N.Y. Laws ch. 1040, § 10, which makes it a crime for a lobbyist to be paid a fee contingent on the defeat or passage of legislation. See also 2 U.S.C. 261 *et seq.* It is difficult to believe that one complying in good faith with the statutory regulation of lobbying could be found to have acted with the criminal intent required to sustain a conviction for extortion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

APRIL 1983

DOJ-1983-04

No. 82-1126

IN THE

Supreme Court of the United States

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
Counsel of Record
IRVING YOUNGER
ROBERT L. WEINBERG
JOHN J. BUCKLEY, JR.
Hill Building
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

Of Counsel:
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

A. This case poses the issue whether Petitioner, a Republican Party leader, was correctly held to have violated the mail fraud statute, 18 U.S.C. § 1341, based on the unprecedented theory that:

(a) private citizens who are active in the political process owe the same fiduciary duty of "honest and loyal" service to the general electorate as that owed by public officials;

(b) Petitioner became such a quasi-governmental fiduciary as a result of his position in the Republican Party and was therefore required to make public disclosure of all "material" information, including any "bias" or "conflict of interest" relating to his political activities and patronage recommendations, and

(c) Petitioner's non-disclosure of his alleged bias and conflict in this case deprived the public of its "intangible right" to his loyal fiduciary services and hence violated the mail fraud statute, notwithstanding the absence of any economic injury or loss to anyone.

1. In defending these remarkable propositions, the government's brief relies solely on the false premise that

Petitioner was a "de facto public official" who "in fact controlled the governmental decision-making process . . . ." (G. Br. i, 5). That argument is a gross distortion of the charge in the indictment, the trial court's findings following the first trial, the evidence presented at the second trial, and the offense as defined in the jury instructions.

First, the indictment did not allege that Petitioner controlled governmental decision-making, but merely that his Party position gave him "great influence" over public officials who had been Republican Party candidates. (A. 14).[1] The government's brief below expressly conceded that "[t]he indictment did not allege that he exercised *de facto* control . . . ." (G. Br. 57, n.31).

Second, in discussing the extortion charges following the first trial, the trial court expressly held that Petitioner was *not* a *de facto* public official exercising control over governmental decision-making. (A. 88-90). Emphatically rejecting the government's position, the trial court concluded that it would not, "in any sense, be a reasonable conclusion that defendant had such powers as a result of his participation in County government . . . ." (A. 89). The trial court found that "[t]he only participation concerning which there was evidence at trial was that defendant was consulted about and recommended the appointment of officials and employees to various positions in local government." (A. 89-90). As the trial court specifically held, patronage recommendations were Petitioner's "*only participation*" in governmental affairs.

Third, the evidence at the second trial once again showed that Petitioner's role consisted of nothing more than political patronage recommendations. This traditonal party function was performed at the request of Republican public officials who sought political clearance from the Republican Party organization for hirings, raises and promotions in certain non-civil service posi-

[1] References herein to "A." are to the Appendix in the Court of Appeals.

tions. Petitioner's own approval was sought only for certain high-level appointments, such as County or Town attorneys and deputy department heads. (A. 585-91, 681). The government contends that Petitioner had a "vice-like grip" (G. Br. 2), but when County Executive Caso had a political "break-up" with Petitioner from 1975 through 1977, Caso no longer communicated with Petitioner or Republican headquarters regarding patronage and dismissed several high-level County employees who were supporters of Petitioner. (A. 667-69). As a consequence, the Republican Party exercised no political clearance at all for County positions between 1975 and 1977.[2]

Contrary to the government's belief (G. Br. 9), there was nothing "unique" about the political role of Petitioner and the Republican Party, nor was the jury asked to find that there was. Petitioner's approval function was no different from the political clearance given today for Executive Branch appointments by the Chairman of the National Republican Party. Moreover, the unchallenged trial testimony showed that the Republican Party's political clearance system was no different from the system that had existed under the prior Democratic administration and was already in effect when Petitioner became Town Republican Chairman in 1967. (A. 618, 632-34; 817-18).

Fourth, the jury instructions likewise did not require any finding that Petitioner was a *de facto* public official or had *de facto* control over government. They were instead based on the looser and even more nebulous notion of "participation in Governmental affairs," which amounted to a

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[2] The patronage system was run by the regular Party employees and local Party officials, with no participation at all by Petitioner in the great majority of instances. The Party's involvement was strictly limited to personnel decisions in the non-civil service. Apart from making a political recommendation for the broker designation (*which both the panel majority and the trial court agreed was not a public office* (Pet. App. 32a)), Petitioner and the Republican Party had no involvement in municipal insurance matters.

simple "reliance" test. To conclude that Petitioner was a quasi-governmental fiduciary, the jury was required to find nothing more than that Petitioner's "participation [in the 'affairs of Government'] is relied on by others in Government in order to carry forward the business of governing as a whole and with the intention of conducting and carrying forward affairs of the Government in which he participates." (A. 116). In no way does this instruction constitute a "control test." To the contrary, if a quasi-governmental fiduciary is anyone who is "relied upon by others in Government," then it surely embraces virtually every political party leader who makes patronage recommendations and virtually any head or representative of an effective lobbying group or influential special interest group. Rather than containing "explicit limitations" (G. Br. 7), the Court of Appeals' decision has unbounded scope.[3]

2. Even had Petitioner's conviction rested on a "*de facto* control" test, it would still be unprecedented and unwarranted. The government's ludicrous assertion that the decision below rests on "ample precedent" flies in the face of the Court of Appeals' own admission that "this [is a] case of first impression" presenting a "novel application of the mail fraud statute on an 'intangible rights' theory to a non-office holder such as Margiotta." (A. 20a). The present indictment and the court's charge have been described as representing a "quantum leap in the extension of the statute." Coffee, *supra*, at 143. The representative of the U.S. Attorney's Office responsible

[3] The unexceptional nature of Petitioner's political role, and hence the broad reach of the prosecution's mail fraud theory, have been noted in scholarly commentary. *See* Coffee, *From Tort To Crime: Some Reflections On The Criminalization of Fiduciary Breaches And The Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 146 (1981). ("The power held by a Republican Party Chairman to influence appointments in a particular county may be no greater than that held by the head of the AFL-CIO to influence the appointment of the Secretary of Labor or of the Executive Director of the NAACP to veto a proposed Chairman of the EEOC.")

for this prosecution has admitted that "[t]his is the first case in which someone who holds no government position has been convicted of committing a fraud on the public . . . ." *American Bar Association Journal*, vol. 69, p. 271 (March, 1983). The four dissenting judges thought the panel opinion to be so unsupported as to warrant *en banc* review.

The government simply ignores the indisputable fact that the fiduciary obligation alleged here—a duty to the general citizenry requiring "honest and faithful" participation in governmental affairs—has never before been recognized as a proper basis for a mail fraud violation where the defendant is a private citizen like Petitioner. Rather, it has been applied and defined strictly in terms of *public officials*. The Court of Appeals expanded the controversial "intangible rights" theory to mean that a *private citizen* who engages in political activity is subject to the same fiduciary standards that a government official owes to the public.[4]

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[4] In its attempt to conceal the novelty of the decision below, the government engages in an outrageous misrepresentation of Judge Winter's opinion. Its brief states: "As Judge Winter acknowledged in dissent, there is 'substantial and direct precedent' for the court's holding, which in any event was carefully 'limit[ed] . . . to the facts of this case' (*id.* at 63a, 65a)." Judge Winter actually said:

> "Given this sweeping charge and the majority opinion, *no amount of rhetoric seeking to limit the holding to the facts of this case can conceal that there is no end to the common political practices which may now be swept within the ambit of mail fraud.*" (Pet. App. 63a).
>
> "However logical this growth of the law may seem, it leads to a result which is not only greater than, but is roughly the square of, the sum of the parts. *The proposition that any person active in political affairs who fails to disclose a fact material to that participation to the public is guilty of mail fraud finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation.*" (Pet. App. 65a). (Emphasis added).

The government's resort to the use of transposed and partial quotations to misrepresent Judge Winter's views tellingly demonstrates the untenability of its position in this case.

3. The government does not deny that the Court of Appeals' decision creates, for the first time, a federal common law of fiduciary duty under the mail fraud statute. The panel opinion expressly noted that its decision is contrary to this Court's decision in *Santa Fe Securities, Inc.* v. *Green*, 430 U.S. 462 (1977), which refused to create federal fiduciary standards under the anti-fraud provisions of Rule 10-b(5) of the federal securities act. (Pet. App. 29a). The government attempts to distinguish the *Santa Fe* decision on the nonsensical ground that the federal securities act uses the word "deception" while the fraud statute uses the words "scheme or artifice to defraud." (G. Br. 11). It nowhere explains why this choice of words is decisive in determining which of these two anti-fraud provisions authorizes a federal common law of fiduciary duty.

The issues in the present case are analogous to those in *Dirks* v. *Securities and Exchange Commission*, No. 82-276, as the government seems to concede by its silence. The importance of the question posed in *Dirks*—whether the anti-fraud provisions of the federal securities law can be construed to impose federal fiduciary duties on securities analysts—pales by comparison with the instant case. The federal fiduciary duty imposed on Petitioner is the lynchpin, not for mere civil penalties as in *Dirks*, but for criminal penalties in the area of constitutionally-protected conduct.[5]

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[5] Contrary to the government's suggestion, Petitioner's conviction does not alternatively rest on his status as a fiduciary under state law. The trial court never found any fiduciary status under state law, and the jury was not instructed on state law. The panel opinion held Petitioner to be a *federal* fiduciary and stated that "we need not examine state law. . . ." (Pet. App. 29a). Only in reference to the obvious federalism problem did the panel opinion declare, *in dicta*, that state law was consistent because it recognized that the "concepts" of reliance and de facto control were "at the heart of the fiduciary relationship." (*Id.*, at 31a). This assertion is disingenuous, since no New York case has ever held that any private citizen, much less a Party Chairman, becomes a quasi-governmental

4. Contrary to the government's assertion, Petitioner does indeed maintain that this prosecution violates his First Amendment rights. A Republican Party leader is constitutionally entitled to represent Republican Party interests, and the Republican Party is likewise entitled to the uncompromised fiduciary services of its own employee and party leader. To make Petitioner a quasi-governmental fiduciary based on his political party activity violates both his and his Party's First Amendment rights. Moreover, Petitioner received no fair notice or warning that he could be a quasi-governmental fiduciary under federal or state law as a result of his participation in political patronage.[6] No person should be deprived of his liberty on the basis of a duty that was acquired invisibly, unknowingly, and unwillingly and announced *ex post facto* by the jury's verdict of guilty. Nor should any person be held to have violated a criminal statute that gave no notice of its application. Judge Winter noted that there was "not the slightest basis in Congressional intent, statutory language, or common canons of statutory interpretation" for this result. (Pet. App. 65a). No case had ever hinted of this fiduciary duty or mail-fraud application, and even Judge Kaufman called it "novel." (*Id.*, at 20a).

B. The four dissenting judges below voted for *en banc* consideration of the entire case, including Petitioner's

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fiduciary on the basis of such "concepts." Judge Winter aptly called the panel opinion's conclusion "sheer *ipse dixit*." (*Id.*, at 61a n.2).

[6] The government's contention that Petitioner had "notice" because two New York statutes prohibit the purchase or sale of a "public office or place" ignores the trial court's ruling, affirmed by the Court of Appeals, that the broker designation was not a "public office or place" and that the statutes were inapplicable. Nor would these New York statutes, even had they been applicable, have given notice to Petitioner that under the federal mail fraud statute he could be a fiduciary for the general electorate. The constitutional requirement that the federal mail fraud statute give fair notice cannot be satisfied by reference to *state* statutes. Indeed, the government's "notice" argument expressly depends upon this Court reversing the lower courts' decision that these New York statutes were inapplicable.

conviction under the Hobbs Act, 18 U.S.C. § 1951.[7] Those counts rest on the unprecedented theory that a party leader's receipt of money on his party's behalf constitutes extortion "under color of official right" if he caused public officials to contribute "in a substantial way" in inducing the payment. (A. 143). Under the decision below, a party leader's simple receipt of money on his party's behalf, if induced in the above manner, constitutes "official" extortion, irrespective of the lack of any *quid pro quo*. As the jury was instructed, "there need be no promises with respect to official action in return for receiving the payment." (A. 142). Here, Petitioner was convicted of "official" extortion because he and the Republican Party received payments from the Williams Agency that were allegedly induced by the Agency's belief that County Executive Caso would designate and retain as insurance broker any person recommended by Petitioner. In short, Petitioner was held to have committed "official" extortion based on the alleged victim's perception of his political influence over public officials.[8]

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[7] The entire Petition would have to be granted even if only the mail fraud conviction was erroneous. The existence of concurrent sentences does not make consideration of the erroneous count an "advisory opinion" (G. Br. 15). *Benton* v. *Maryland*, 395 U.S. 784, 790 (1969). Moreover, the improper mail fraud count prejudiced the jury's consideration of the Hobbs Act counts. For example, the improper mail fraud count allowed the introduction of otherwise inadmissible evidence concerning Petitioner's partisan patronage activities and certain alleged payments, including to former Republican Judge D'Auria. The trial court's erroneous jury instructions on the mail fraud count further created the erroneous impression that Petitioner was a *de facto* public official, thus prejudicing the jury's consideration of the Hobbs Act counts.

[8] Because Petitioner was treated as if he were a public official, the jury was allowed to convict him without any finding or proof that he used or threatened force, violence or fear or that the Williams Agency was induced to make the payments by fear, including fear of economic loss. Instead, the trial court applied the rule for "official" extortion that the " 'fear' element on the part of the 'victim' [is] implied from the public official's position of authority over the victim." *United States* v. *Butler*, 618 F.2d 411, 418-19 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980).

In creating this new crime of "political influence," the government eschews each and every one of the elements of "official" extortion. First, it asserts that "neither direct receipt [of the payment by the public official] nor personal transference to third parties" by the public official is required. (G. Br. 17). The classic definition of "official" extortion, however, is a public's official's wrongful use of his office to obtain money not due him or his office. *United States* v. *Nardello*, 393 U.S. 286, 289 (1959). The cases cited by the government involved a public official's direction of payments to others. Here, public official Caso was not the recipient, directly or indirectly, of any payments by the Williams Agency, nor did he direct any payments to third parties.

Second, the government concedes that public official Caso must have misused his office for there to have been "official" extortion but asserts that Caso's designation of the Williams Agency as broker constituted such misuse. However, Caso's involvement in traditional patronage was not a misuse of his office nor was it extortionate. It was undisputed that Caso was not party to any commission-sharing arrangement, did not request or even know about such sharing, and did not misuse his office to "induce the payment. . . ." *United States* v. *Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).[9]

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[9] As one commentator has noted:

> "It is never clearly articulated by the Court of Appeals why, if Caso and the other officials did nothing improper, their actions (imputed to Margiotta) somehow became 'extortion.'
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> * * * *
>
> "Mr. Caso testified at the trial that he was unaware of the commission-splitting arrangement. There was no proof that he ever implied that the Williams Agency could have the business if it did or did not do some act . . . . [Caso's designation of the Agency] was not an indispensible element of the offense of *extortion* under color of official right. It was only an element in the causal chain of the fee-splitting arrangement; but that does not make it an indispensible element of the crime of ex-

Finally, the government ignores the requirement that the victim's "motivation for the payment focuse[d] on the recipient's [public] office." *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). In this case the "recipients," Petitioner and the Republican Party, held no public office. Obviously, the Agency's motivation could not have focused on the defendant's non-existent public office. And Caso, who held a public office, was not himself a recipient of any payments, never requested the payments, and was unaware of their existence.[10]

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
Counsel of Record
Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

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tortion." Obermaier, *Criminal Causation and Imputed Capacity*, N.Y.L.J. Jan. 4, 1983, p. 2, col. 1.

[10] The government's construction of the Hobbs Act makes the receipt of contributions by a political party or other special interest group unlawful if the donor was induced by a belief that the recipient organization possessed influence over public officials. Every political contribution made to a political party could be characterized as "official" extortion under this view. All that a public official need do is to "contribute in a substantial way to inducing" the campaign contribution. Here, the inaction of public official Caso and his successor Purcell (in not removing the Williams Agency's broker designation) sufficed to supply that minimal involvement. In the case of an ordinary campaign contribution, the attendance of a public official at a fund raiser would seem to suffice as "official" extortion.